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CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*
High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*
and L. M. BANERJI, *Vakil, High Court.*

VOL. XXXI.
1909.

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Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897 .. .. 2 *a.* 6 *p.* (1 *a*)

Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1903 ... . 1 *a.* (1 *a*)

Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 ... 2 *a* (1 *a*)

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... 6 a. 6 p. (1 a.)

Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... 1 a. 9 p. (1 a.)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a.)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1904 ... ... 13 a. (2 a.)

Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a.)

Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... 4 a. 9 p. (1 a.)

Regulation I of 1895 (Kachin Hill Tribes) as modified up to 1st April, 1902 ... ... 6 a. (1 a.)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906.

Regulations made under the Statute 33, Vict., Cap. 3, from No. II of 1875 to 1906. *8vo. Stitched.*

[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act		Language	Price
Acts X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December, 1901		In Urdu.	2 a. 6 p. (1 a.)
Act XX of 1847 (Copyright), as modified up to 1st May, 1896		In Urdu.	1 a. 3 p. (1 a.)
Ditto	ditto	In Nagri.	1 a. 3 p. (1 a.)
Act XVIII of 1850 (Judicial Officers' Protection), with footnotes		In Urdu.	6 p. (1 a.)
Ditto	ditto	In Nagri.	6 p. (1 a.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903		In Urdu.	6 p. (1 a.)
Ditto	ditto	In Nagri.	6 p. (1 a.)
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902		In Urdu.	6 p. (1 a.)
Ditto	ditto	In Nagri.	6 p. (1 a.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904		In Urdu.	3 p. (1 a.)
Ditto	ditto	In Nagri.	3 p. (1 a.)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903		In Urdu.	6 p. (1 a.)
Ditto	ditto	In Nagri.	6 p. (1 a.)
Act XV of 1856 (Hindu Widows' Re-marriage)		In Urdu.	6 p. (1 a.)
Ditto	ditto	In Nagri.	6 p. (1 a.)
Act XX of 1856, (Police Chaukidars) as modified up to 1st November, 1903		In Urdu.	2 a. 6 p. (1 a.)
Ditto	ditto	In Nagri.	2 a. 6 p. (1 a.)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903		In Urdu.	1 a. (1 a.)
Ditto	ditto	In Nagri.	1 a. (1 a.)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April 1903		In Urdu.	1 a. (1 a.)
Ditto	ditto	In Nagri.	1 a. (1 a.)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902		In Urdu.	1 a. 6 p. (1 a.)
Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874		In Urdu.	3 p. (1 a.)
Ditto	ditto	In Nagri.	3 p. (1 a.)
Act IX of 1860 [Employers and Workmen (Disputes) as modified up to 1st December, 1904		In Urdu.	3 p. (1 a.)
Ditto	ditto	In Nagri.	3 p. (1 a.)
Act XLV of 1860 (Penal Code), as modified up to 1st April 1903		In Urdu.	Rs. 1-5. (5 a.)
Ditto	ditto	In Nagri.	Rs. 1-5. (5 a.)

Act V of 1861 (Police), as modified up to 7th March, 1903 ...	... In Urdu. 2 a. 9 p (1 a.)
Ditto ditto	... In Nagri. 2 a 9 p. (1 a.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	In Urdu. 1 a 3 p. (1 a.)
Ditto ditto	... In Nagri, 1 a. 3 p. (1 a.)
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	... In Urdu. 1 a. (1 a.)
Ditto ditto	... In Nagri. 1 a. (1 a)
Act III of 1865 (Carriers), as modified up to 31st May, 1903 ...	... In Urdu. 9 p. (1 a)
Ditto ditto ...	... In Nagri. 9 p. (1 a)
Act III of 1867 (Gambling), as modified up to 1st December, 1896	... In Nagri. 1 a. 3 p. (1 a)
Ditto ditto 1st January, 1905	... In Urdu. 1 a (1 a)
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Ditto 1st October 1899	... In Nagri. 8 a 9 p (1 a)
Act I of 1871 (Cattle-trespass), as modified up to 1st December, 1903	... In Urdu 1 a. 9 p (1 a)
Ditto ditto	... In Nagri. 1 a 9 p. (1 a)
Act XXIII of 1871 (Pensions)	... In Urdu, 9 p. (1 a.)
Ditto	... In Nagri. 9 p. (1 a.)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	... In Urdu 2 a. 6 p (1 6 p.)
Act IX of 1872 (Contract) as modified up to 1st September, 1899	... In Urdu. 9 a 9 p. (3 a.)
Ditto ditto	... In Nagri. 9 a. 6 p. (3 a)
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ...	In Urdu. 4 a. (2 a)
Ditto ditto	... In Nagri. 4 a (2 a)
Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903	... In Urdu. 9 p (1 a)
Ditto ditto	... In Nagri. 9. p (1 a.)
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899	... In Urdu. 3 a 3 p. (1 a.)
Ditto ditto	... In Nagri. 3 a. 3 p. (1 a.
Act X of 1873 (Oaths), as modified up to 1st February 1903 ...	... In Urdu. 1 a (1 a.)
Ditto ditto ...	... In Nagri. 9 p. (1 a)
Act XVI of 1873 (Village and Road Police, United Provinces)	... In Urdu. 1 a. (1 a.)
Act IX of 1874 (European Vagrancy)	... In Urdu. 2 a. (1 a.)
Act IX of 1875 (Majority), as modified up to 1st May, 1906 ...	... In Urdu. 3 p (1 a)
Ditto ditto ...	... In Nagri. 3 p. 1 a.)
Act XI of 1876 (Presidency Banks) as modified up to 1st March, 1906 ...	In Urdu. 3 a. 9 p. (1 6 p.)
Ditto ditto	... In Nagri. 3 a. 6 p (1 6 p.)
Act XVIII of 1876 (Oudh Laws)	... In Urdu. 2 a (1 a)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904	In Urdu. 4 a 6 p. (1 a 6 p)
Ditto ditto	... In Nagri. 4 a. 6 p (1 6 p.)
Act I of 1878 (Opium), as modified up to 1st December, 1896 ...	... In Nagri. 1 a. 6 p. (1 a
Act VII of 1878 (Forests), as modified up to 1st December, 1903	... In Urdu 4 a. (1 a 6 p.
Ditto ditto	... In Nagri. 4 a. (1 a. 6 p
Act XI of 1878 (Arms), as modified up to 1st May, 1901 ...	... In Urdu 2 a. (1 a.).
Ditto ditto ..	... In Nagri. 2 a. (1 a.)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1892	... In Urdu. 2 a. (1 a)
Ditto ditto	.. In Nagri 2 a. (1 a)
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896	In Urdu. 2 a. 9 p. (1 a
Ditto ditto	

Act	Price
Act XV of 1881 (Factories), as modified up to 1st April, 1891 ...	In Urdu. 1 *a* 6 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 1 *a*. 6 *p*. (1 *a*.)
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898 ...	In Urdu. 9 *a*. (1 *a* 6 *p*)
Ditto ditto ...	In Nagri. 9 *a*. (1 *a*. 6 *p*)
Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900	In Urdu. 6 *a*. 9 *p*. (2 *a*.)
Ditto ditto ...	In Nagri 6 *a*. 9 *p* (2 *a*.)
Act VI of 1882 (Companies), as modified up to 1st August 1903 ...	In Urdu. 13 *a* 9 *p* (3 *a*.)
Ditto ditto ...	In Nagri. 14 *a*. (3 *a*)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ...	In Urdu. 1 *a*. (1 *a*)
Ditto ditto ...	In Nagri. 1 *a* (1 *a*.)
Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ...	In Urdu. 1 *a*. 3 *p*. (1 *a*)
Ditto ditto ...	In Nagri. 1 *a* 3 *p*. (1 *a*.)
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1901	In Urdu. 3 *a* 6 *p* (1 *a* 6 *p*.)
Ditto ditto ...	In Nagri. 3 *a*. 6 *p*. (1 *a*. 6 *p*.)
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906 ...	In Urdu. 6 *p*. (1 *a*)
Ditto ditto ...	In Nagri. 6 *p* (1 *a*)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899	In Urdu. 2 *a*. 6 *p*. (1 *a*)
Act II of 1885 (Negotiable Instruments Amendment) ...	In Urdu. 9 *p* (1 *a*.)
Act III of 1885 (Transfer of Property Amendment) ...	In Urdu 3 *p*. (1 *a*)
Act X of 1885 (Oudh Estates Amendment) ...	In Urdu. 3 *p*. (1 *a*.)
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ...	In Urdu. 1 *a* 9 *p*. (1 *a*)
Act XXI of 1885 (Madras Civil Courts Amendment) ...	In Urdu 3 *p* (1 *a*)
Act II of 1886 (Income tax), as modified up to 1st April, 1903 ...	In Urdu. 3 *a*. (1 *a*. 9 *p*)
Ditto ditto ...	In Nagri. 3 *a* (1 *a* 9 *p*)
Act IV of 1886 (Amending Section 25 of Contract Act) ...	In Urdu 3 *p* (1 *a*.)
Act VI of 1886 (Births, Deaths and Marriage Registration) ...	In Urdu. 1 *a* 3 *p*. (1 *a*)
Act X of 1886 (Criminal Law Amendment) ...	In Urdu 9 *p*. (1 *a*)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu. 3 *a*. 3 *p* (1 *a*.)
Ditto ditto ...	In Nagri. 3 *a*. 3 *p*. (1 *a*)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891 ...	In Urdu. 9 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 9 *p* (1 *a*)
Act VI of 1887 (Companies Amendment) ...	In Urdu. 3 *p*. (1 *a*)
Act VII of 1887 (Suits' Valuation) ...	In Urdu. 9 *p*. (1 *a*)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896 ...	In Urdu 2 *a*. 3 *p* (1 *a*)
Ditto ditto ...	In Nagri. 2 *a* 6 *p*. (1 *a*.)
Act X of 1887 (Native Passenger Ships) ...	In Urdu 1 *a* 6 *p*. (1 *a*)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	In Urdu 1 *a* 3 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 1 *a* 3 *p*. (1 *a*)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	In Urdu. 3 *a* 6 *p* (1 *a*.)
Ditto ditto ...	In Nagri 3 *a*. 3 *p*. (1 *a*)
Act XV of 1887 (Burma Military Police) ...	In Urdu. 9 *p* (1 *a*.)
Ditto ...	In Nagri. 9 *p*. (1 *a*.)
Act XVIII of 1887 (Allahabad University) ...	In Urdu 1 *a*. (1 *a*)
Act III of 1888 (Police), as modified up to 1st March, 1893 ...	In Urdu 3 *p* (1 *a*)
Ditto (as passed) ...	In Nagri 6 *p*. (1 *a*.)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893 ...	In Urdu. 3 *p* (1 *a*.)
Ditto (as passed) ...	In Nagri 3 *p* (1 *a*.)
Act V of 1888 (Inventions and Designs) ...	In Urdu 2 *a*. 3 *p* (1 *a*)

Act		Edition	Price
	..	In Urdu	6 p. (1 a.)
Act VI of 1888 (Debtors) ...	...	In Nagri.	6 p. (1 a.)
Ditto	...	In Urdu.	6 p (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April 1904	..	In Nagri.	6 p (1 a)
Ditto ditto	...	In Urdu	3 p. (1 a.)
Act II of 1889 (Measures of Length) ..	...	In Nagri.	3 p (1 a.)
Ditto			
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	...	In Urdu	1 a 9 p. (1 a.)
ditto	...	In Nagri.	2 a (1 a.)
Ditto	...	In Urdu.	6 p. (1 a.)
Act VI of 1889 (Probate and Administration)		In Nagri	6 p. (1 a)
Ditto			
Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903	...	In Urdu.	1 a 9 p. (1 a)
	.	In Nagri.	3 a (1 a 9. p)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1905	...	In Urdu	9 p. (1 a.)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	...	In Nagri.	9 p. (1 a)
Ditto ditto	..	In Urdu.	1 a 6 p (1 a)
Act XVI of 1889 (Central Provinces Land Revenue)	...	In Nagri.	1 a 6 p (1 a.)
Ditto ditto	..	In Urdu.	3 p (1 a)
Act XX of 1889 (Lunatic Asylums Amendment) ...	...	In Urdu	3 p (1 a)
Act I of 1890 (Revenue Recovery) ...			
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881) ...	...	In Urdu.	(3 p) (1 a)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	.	In Urdu.	(6 p.) (1 a.)
Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1903	..	In Urdu	6 p. (1 a.)
Act VIII of 1890 (Guardians and Wards)	...	In Urdu.	2 a 3 p. (1 a 9 p)
Act IX of 1890 (Railways), as modified up to 1st June 1905 ...	.	In Urdu.	8 a. (2 a)
Ditto as modified up to 1st May 1906 ...	.	In Nagri.	8 a (2 a.)
Act X of 1890 (Press and Registration of Books Amendment)	...	In Urdu.	3 p (1 a.)
Act XI of 1890 (Prevention of Cruelty to Animals)	...	In Urdu	6 p. (1 a)
Act XIX of 1890 (Salt Amendment)	..	In Urdu.	3 p. (1 a.)
Act XX of 1890 (North-Western Provinces and Oudh)	...	In Urdu.	1 a (1 a)
Act X of 1891 (Indian Criminal Law Amendment)	...	In Urdu	3 p. (1 a)
Act XIV of 1891 (Oudh Courts)	...	In Urdu.	6 p. (1 a)
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900	..	In Urdu.	3 p (1 a.)
Ditto ditto	...	In Nagri.	6 p. (1 a)
Act II of 1892 (Christian Marriage Validation)	.	In Urdu.	3 p (1 a.)
Act IV of 1892 (Bengal Court of Wards Amendment)	..	In Urdu.	6 p. (1 p.)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	.	In Urdu.	3 p (1 a.)
Act IV of 1893 (Partition) .	..	In Urdu.	3 p. (1 a)
Act I of 1894 (Land Acquisition)	...	In Urdu.	2 a 3 p. (1 a 6 p)
Ditto	...	In Nagri	1 a. 6 p. (1 a 6 p)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	...	In Urdu	3 p. (1 a)
Act V of 1894 (Civil Procedure Code Amendment)	...	In Urdu	3 p. (1 a.)
Ditto ditto	...	In Nagri.	3 p. (1 a)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	...	In Urdu	4 a (1 a.)
Ditto ditto	...	In Nagri.	3 a 9 p (1 a)
Act IX of 1894 (Prisons) ...	...	In Urdu.	2 a 3 p (1 a)
Ditto	...	In Nagri.	2 a. 3 p. (1 a)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)		In Urdu	3 p (1 a)
Ditto ditto	...	In Nagri.	3 p. (1 a.)
Act XII of 1895 (Companies—Memorandum of Association)	...	In Urdu.	3 a. (1 a.)

Act		Price
Act XIV of 1895 (Pilgrim Ships)	In Urdu.	1 a. 3 p. (1 a.)
Act II of 1896 (Cotton duties)	In Urdu.	1 a. 3 p. (1 a)
Ditto	In Nagri.	1 a. (1 a.)
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu.	3 p. (1 a.)
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p (1 a.)
Act XII of 1896 (Excise), as modified up to 1st August, 1905... ...	In Nagri.	3. a 3 p. (1 a)
Act I of 1897 (Act XXXVII of 1850 Amendment)...	In Urdu	3 p. (1 a)
Ditto ditto	In Nagri.	3 p. (1 a.)
Act II of 1897 (Criminal Tribes Amendment Act)...	In Urdu.	3 p. (1 a)
Act III of 1897 (Epidemic Diseases)	In Urdu.	3 p. (1 a.)
Ditto	In Nagri.	3 p. (1 a)
Act IV of 1897 (Fisheries)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p (1 a.)
Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu.	3. p. (1 a.)
Ditto ditto	In Nagri.	3 p. (1 a)
Act VIII of 1897 (Reformatory Schools)	In Urdu.	1 a. 3 p. (1 a.)
Ditto	In Nagri.	6 p. (1 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ...	In Urdu.	9 p. (1 a.)
Ditto ditto ...	In Nagri.	9 p. (1 a)
Act X of 1897 (General Clauses)	In Urdu	1 a. (1 a.)
Ditto	In Nagri.	1 a. (1 a)
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu.	3 p. (1 a.)
Ditto ditto	In Nagri.	3 p. (1 a)
Act XV of 1897 (Cantonments)	In Urdu.	3 p. 1 a.)
Act I of 1898 [Stage-carriages Act (1861) Amendment]	In Urdu.	3 p. (1 a)
Ditto ditto	In Nagri.	3 p. (1 a)
Act III of 1898 (Lepers)	In Urdu.	6 p. (1 a)
Ditto	In Nagri.	6 p. (1 a)
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu	3 p. (1 a.)
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April 1900	In Urdu.	Re. 1-4 (8 a)
Ditto ditto ...	In Nagri.	Re 1-6 (8 a)
Act VI of 1898 (Post Office)	In Urdu.	3 a 3 p. (1 a.)
Ditto ditto ...	In Nagri.	3 a. 3 p. (1 a)
Act IX of 1898 (Live-stock Importation)	In Urdu	3 p (1 a)
Ditto ditto ...	In Nagri.	3 p (1 a)
Act X of 1898 (Indian Insolvency Rules)	In Urdu	3 p (1 a.)
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu.	6 p (1 a)
Ditto ditto ...	In Nagri.	6 p. (1 a.)
Act II of 1899 (Stamps), as modified up to 31st August, 1905 ...	In Urdu	7 a. 6 p (1 a. 6 p)
Ditto ditto ...	In Nagri	7 a 6 p (1 a. 6 p.)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ...	In Urdu.	2 a 3 p (1 a.)
Ditto ditto ...	In Nagri.	2. a 3 p. (1 a.)
Act IV of 1899 (Government Buildings)	In Urdu.	3 p. (1 a)
Ditto ditto ..	In Nagri.	3 p. (1 a.)
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment ...	In Urdu.	3 p (1 a)
Ditto ditto ...	In Nagri.	3 p. (1 a)
Act VIII of 1899 (Petroleum), as modified up to 1st January 1900 ...	In Urdu.	1 a. 6 p (1 a)
Ditto ditto ...	In Nagri.	1 a 6 p. (1 a)
Act IX of 1899 (Arbitration)	In Urdu.	9 p (1 a.)
Ditto ditto ...	In Nagri.	9 p (1 a)
Act XI of 1899 (Court-fees Amendment)	In Urdu	6 p. (1 a)
Ditto ditto ...	In Nagri	6 p (1 a.)
Act XII of 1899 (Currency Notes Forgery)	In Urdu.	3 p. (1 a.)

Act VI of 1888 (Debtors)	In Urdu 6 p. (1 a.)
Ditto	In Nagri 6 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April 1904	In Urdu. 6 p (1 a.)
Ditto ditto	In Nagri. 6 p (1 a.)
Act II of 1889 (Measures of Length)	In Urdu 3 p. (1 a.)
Ditto	In Nagri 3 p (1 a)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu 1 a 9 p. (1 a)
Ditto ditto	In Nagri. 2 a (1 a.)
Act VI of 1889 (Probate and Administration)	In Urdu. 6 p (1 a.)
Ditto	In Nagri 6 p (1 a.)
Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903	In Urdu. 1 a 9 p (1 a
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1905	In Nagri. 3 a (1 a 9
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	In Urdu 9 p. (1 a)
Ditto ditto	In Nagri. 9 p. (1 a)
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu. 1 a 6 p (1 a
Ditto ditto	In Nagri. 1 a 6 p (1 a
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu 3 p. (1 a)
Act I of 1890 (Revenue Recovery)	In Urdu. 3 p. (1 a)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu (3 p) (1 a)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu. (6 p.) (1 a.)
Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1903	In Urdu 6 p. (1 a.)
Act VIII of 1890 (Guardians and Wards)	In Urdu. 2 a. 3 p. (9 p)
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu. 8 a. (2 a.)
Ditto as modified up to 1st May 1906	In Nagri. 8 a (2 a.)
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu. 3 p (1 a.)
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu 6 p. (1 a.)
Act XIX of 1890 (Salt Amendment)	In Urdu 3 p (1 a)
Act XX of 1890 (North-Western Provinces and Oudh)	In Urdu. 1 a (1 a.)
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu 3 p. (1 a)
Act XIV of 1891 (Oudh Courts)	In Urdu. 6 p. (1 a.)
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900	In Urdu 3 p (1 a.)
Ditto ditto	In Nagri. 6 p (1 a)
Act II of 1892 (Christian Marriage Validation)	In Urdu. 3 p (1 a.)
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu 6 p. (1 p.)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	In Urdu. 3 p (1 a)
Act IV of 1893 (Partition)	In Urdu. 3 p. (1 a)
Act I of 1894 (Land Acquisition)	In Urdu. 2 a. 3 p. 6 p)
Ditto	In Nagri 1 a. 6 p. 6 p)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	In Urdu. 3 p. (1 a)
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	In Urdu. 4 a (1 a.)
Ditto ditto	In Nagri. 3 a 9 p.
Act IX of 1894 (Prisons)	In Urdu 2 a 3 p (
Ditto	In Nagri. 2 a 3 p.
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu. 3 a. (1 a.)

Act XIII of 1903 (Lepers) ... ... In Urdu. 3 p. (1 a)
Ditto ... In Nagri. 3 p. (1 a)
Act XIV of 1903 (Indian Foreign Marriages) ... ... In Urdu. 3 p. (1 a.)
Ditto ... In Nagri. 3 p. (1 a)
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Act I of 1904 (Poisons) ... ... In Urdu 6 p. (1 a)
Ditto ... In Nagri 6 p. (1 a)
Act III of 1904 (Local Authorities Loan) ... ... In Urdu. 3 p. (1 a.)
Ditto .. In Nagri 3 p. (1 a)
Act IV of 1904 (North West Border Military Police) ... ... In Urdu 9 p. (1 a)
Act of 1904 [Transfer of Property (Amendment)] ... ... In Urdu 3 p. (1 a.)
Ditto ditto ... .. In Nagri. 3 p. (1 a)
Act VII of 1904 (Ancient Monuments Preservation) ... ... In Urdu. 9 p. (1 a)
Ditto ditto .. ... In Nagri. 9 p. (1 a)
Act VIII of 1904 (Indian Universities) ... ... In Urdu. 1 a. 3 p. (1 a)
Ditto ditto ... ... In Nagri. 1 a. 3 p. (1 a.)
Act X of 1904 (Co-operative Credit Societies) ... . In Urdu. 1 a (1 a)
Ditto ditto ... ... In Nagri. 1 a. (1 a)
Act XI of 1904 (to revive and continue section 6 (4) of the Indian Tariff Act, 1894) ... ... In Urdu 3 p. (1 a)
Ditto ditto ... ... In Nagri. 3 p. (1 a)
Act XIII of 1904 (Indian Articles of War Amendment) . ... In Urdu. 3 p (1 a)
Ditto ditto ... ... In Nagri 3 p. (1 a)
Act XV of 1904 [Indian Stamp (Amendment)]. ... ... In Urdu. 3 p. (1 a)
Ditto ditto ... ... In Nagri. 3 p. (1 a.)
Act I of 1905 [Local Authorities Loan (Amendment)] .. ... In Urdu. 3 p (1 a)
Ditto ditto ... ... In Nagri. 3 p (1 a.)
Act II of 1905 [Indian Universities ((Validation)] ... ... In Urdu. 3 p (1 a.)
Ditto ditto ... ... In Nagri 3 p (1 a.)
Act III of 1905 (Indian Paper Currency) ... ... In Urdu 9 p (1 a)
Ditto ditto ... ... In Nagri 9 p (1 a)
Act IV of 1905 (Indian Railway Board) ... ... In Urdu. 3 p. (1 a.)
Act VI of 1905 (Court-fees Amendment) ... ... In Urdu. 3 p. (1 a.)
Ditto ditto ... ... In Nagri 3 p (1 a)
Act VII of 1905 (Bengal and Assam Laws) ... ... In Urdu 3 p (1 a.)
Ditto ditto ... ... In Nagri 3 p (1 a)
Regulation I of 1890 (British Baluchistan Laws) ... ... In Urdu 2 a (1 a 9 p)
Regulation V of 1890 (British Baluchistan Forests) ... .. In Urdu 2 a (1 a. 6 p)
Regulation VI of 1893 (Hazara Forests) ... . In Urdu 2 a (1 a 6 p)
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Regulation IX of 1896 (British Baluchistan Civil Justice) ... .. In Urdu 2 a 3 p. (1 a)
Regulation III of 1901 (Frontier Crimes) ... . In Urdu. 2 a. 6 p. (1 a)
Regulation IV of 1901 (Frontier Murderous Outrages) ... ... In Urdu. 6 p (1 a)
Regulation VII of 1901 (North-West Frontier Province) ... ... In Urdu 1 a 3 p. (1 a.)

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FOR THE NORTH-WESTERN PROVINCES.

1909.

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JUDGES OF THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES.

1909.

CHIEF JUSTICE.

THE HON'BLE SIR JOHN STANLEY, KT., K.C. ... *[On leave from the 23rd April to the 12th August.]*

PUISNE JUDGES

THE HON'BLE SIR G. E. KNOX, KT.... *[Acted as Chief Justice from the 23rd April to the 12th August.]*

" P. C. BANERJI.

" R. S. AIKMAN ...*[Retired on the 22nd April.]*

" H. G. RICHARDS, K.C.

" SYED KARAMAT HUSAIN.

" H. D. GRIFFIN ... *[On deputation from the 30th October.]*

" W. TUDBALL ... *[Took his seat on the 23rd April.]*

" C. ROSS ALSTON ... *[Officiated from the 23rd April to the 12th August.]*

" T. C. PIGGOTT ... *[Officiated from the 22nd November.]*

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

Page.

PRIVY COUNCIL.

FULL BENCH.

APPELLATE CIVIL.

REVISIONAL CIVIL.

Page.

MISCELLANEOUS CIVIL.

APPELLATE CRIMINAL.

REVISIONAL CRIMINAL.

REVISIONAL CIVIL.

Page.

MISCELLANEOUS CIVIL.

APPELLATE CRIMINAL.

REVISIONAL CRIMINAL.

TABLE OF CASES CITED.

Page.

A.

B.

Page.

T.

V.

W.

Z.

GENERAL INDEX OF CASES REPORTED IN THIS VOLUME.

attached to it show that the object and purpose with which it was passed were to revise and correct what had been hastily and imperfectly or loosely done and to secure that no person should enjoy under-proprietary rights who could not establish his claim in the manner prescribed by those rules.

"Claims which have been disposed of otherwise than in accordance with these rules," in rule 13, mean claims which have not been supported by the proofs prescribed by, amongst other provisions, rules 2 and 3, that is, proof that the claimant possesses an under-proprietary right in the lands of which sub-settlement is claimed, that such right has been kept alive over the whole area claimed within the period of limitation, and that he has by virtue only of his under-proprietary right held the lands under contract with some degree of continuousness since they came into the taluq

follows:—"The provisions of the Sub-Settlement Act have not been complied with.. .....As the original proprietary title has not been proved, the plaintiff is in no way entitled to sub-settlement, which actually restores him under our rules to proprietary possession, and makes the taluqdar who has been half a century in possession, the mere recipient of malikana. I decree a farming lease to plaintiff, he paying the Government demand plus 25 per cent. to the taluqdar for a period of 30 years."

Held that the Financial Commissioner had jurisdiction under section 13 of the rules under Act XXVI of 1866 to make the decree of 6th January 1869, and that it was a valid and binding decree.

Held also that, on the construction of the decree the lease was one for a term of 30 years from the date of the decree, and on the expiration of that period the lessee was liable to ejectment in a suit in the Revenue Court under the Oudh Rent Act (XXII of 1886).

Maheshar Parshad *v* Muhammad Ewaz Ali Khan .. 394

ACTS—1869—I (OUDH ESTATES ACT), SECTIONS 22 AND 23—*Evidence—Custom, proof of—Custom excluding daughters—Wajib-ul-arz—Evidence of custom of succession to impartible estate whether admissible in proving custom of succession to partible estate—Concurrent findings as to custom being established, effect of—Declarations by*

appellant's father, set up a custom by which daughters were excluded from inheritance and both Courts in India found on evidence that the custom was proved.

Held, by the Judicial Committee, that if and so far as it was a conclusion of fact the concurrent finding was though not absolutely binding on the committee, entitled to the greatest weight.

Page.

Technical objections to declarations made by kanungos, to entries in the wajib-ul-arzes by the officer charged by Government with that duty, and to answers given to official inquiries made under Government direction as to the rules of succession prevailing in particular families, were considered by their Lordships to be material rather to the weight than to the admissibility of the particular evidence which was *primâ facie* admissible as purporting to be made by the proper officer in preformance of a special duty, and presumably with due regard to the rules laid down for his guidance.

Though under section 17 of the Oudh Land Revenue Act (XVII of 1876) entries duly made and attested in wajib-ul-arzes are presumably correct records of the facts entered, their value as evidence varies according to circumstances. *Muhammad Imam Ali Khan* v. *Husain Khan*, I. L. R., 26 Calc., 81, at p. 92 ; L. R., 25 I. A., 161, at p. 169, followed.

It was contended that evidence of a custom regulating the succession to impartible estates where the rule of gaddi-nashini prevailed was inadmissible on a question as to the custom of succession to a partible estate governed by the ordinary Hindu law applicable to estates in list 1 of Act I of 1869.

Held (referring to *Katama Natchier* v. *Rajah of Shivagunga*, 9 Moo. I. A., 539, *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*, I. L. R., 18 Calc., 151, at p. 154 ; L. R., 17 I. A., 128 at p. 131, and *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai*, I. L. R., 17 Mad. 316 at p. 325) that there was nothing in the mere fact of partibility to make evidence of a family custom excluding or postponing daughters to male collaterals in impartible estates necessarily inapplicable to partible estates.

Wajib-ul-arzes, therefore relating to the succession to impartible estates were held to have been rightly admitted as evidence of the custom set up in the present case.

Lekraj Kunwar v. *Mahpal Singh*, I. L. R., 5 Calc., 741 ; L. R., 7, I. A., 63, and two unreported cases referred to in the judgment of the Judicial Commissioners followed.

Parbati Kunwar *v.* Chandrapal Kunwar 457

ACTS—1870—VII (Court Fees Act) [illegible]

[illegible] court fee on the amount of the principal sum of money secured by the prior mortgage. *Held* that the proper amount of [illegible] on the amount which [illegible] or mortgagee. *Nepal* [illegible] and *Jhanda Mal* v. [illegible], dated 15th January 1905, followed.

Baji Lal *v.* Gobardhan 265

———— SECTION 5—*Schedule I, Article* 45—*Court fee—Interlocutory order—Review*] *Held* that an appli[illegible] tion for review of [illegible] a court fee stamp of [illegible] schedule I of the [illegible] *Bom. Printed Judg* [illegible]

Jagannath Prasad *v.* Mulchand 262

Page.

Page.

ACT [illegible] IX [illegible] —*Act No. I* [illegible] —*Effect of* [illegible] Whether [illegible] into by a minor, where persons who are in fact under age by false and fraudulent misrepresentations as to their age induce others to purchase property from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold. *So held* by BANERJI, J. *Mohori Bibee* v. *Dharmodas Ghose*, I. L. R., 30 Calc., 539, *Brohmo Dutt* v. *Dharmodas Ghose*, I. L. R., 26 Calc., 381, *Ganesh Lala* v. *Bapu*, I. L. R., 21 Bom., 198, and *Stikeman* v. *Dawson*, 16 L. J. Ch., 205, referred to.

RICHARDS, J., differed on the question of fact as to whether the plaintiffs had been induced by any misrepresentations of the defendants as to their ages to enter into the contract sought to be set aside.

Jagar Nath Singh *v.* Lalta Prasad 21

———————— SECTION 16, *as amended by Act No VIII of* 1899—*Suit on bond—Debtor and creditor—Disqualified proprietor whose estate was under control of Court of Wards—Exercise by creditor of undue influence—Unconscionable transaction—Compound interest—Onus of proof of undue influence.*] This was an appeal by the defendant, a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) whose property, on the ground of his indebtedness and consequent inability to manage it, had [illegible]

[illegible] placed the onus on the defendant to prove undue influence, and found that he had failed to do so and that the transaction was not unconscionable.

Held by the Judicial Committee (reversing the decisions of the Courts in India) following the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh*, I. L. R., 28 All., 570: L. R., 33 I. A., 118, in which the same defendant as in the present case was the borrower that he was (as in that case) placed in such a condition of helplessness that the plaintiff was in a position "to dominate his will" within the meaning of section 16 of the Contract Act (IX of 1872) as amended by Act VIII of 1899, and that he used that position to obtain an unfair advantage over the defendant.

Under the circumstances the bond was set aside, and a decree passed for the original sum of Rs. 4,000 with simple interest at 18 per cent. per annum from 14th September 1889 to the date of payment.

Maneshar Bakhsh Singh *v.* Shadi Lall 386

———————— SECTION 25(3). *See* Act No XV of 1877, section 20 495

———————— SECTION 23—*Contract—Agreement immoral or opposed to public policy—Lease of house to a prostitute.*] *Held* that knowingly letting a house to a prostitute with the

Page.

Page.

——— SECTION 202—*Procedure—Court not competent to alter judgment after delivery.*] Where a District Judge wrote and delivered a judgment in a civil appeal, but suspended the issue of his decree pending the production by the plaintiff of a certificate of succession, it was *held* that it was not competent to the Judge to cancel the judgment already delivered and to pronounce a second judgment inconsistent therewith.

Kishan Kunwar *v.* Ganga Prasad 153

Page.

Page.

EVIDENCE—*Proof of adoption—Illiterate pardanashin widow lady—Non-appearance of plaintiff in Court as witness—Absence of any account of expenditure on ceremony—Mode of carrying on business—Inability to give date of adoption—Inconsistent and contradictory evidence—Practice for each litigant to cause his opponent to be cited as a witness*.] Where the question on an appeal was whether his claim to be the adopted son of an illiterate pardanashin widow lady had been established by the respondent, who lived in her house [illegible]

principal witnesses [illegible] important point; the [illegible] inconsistency with [illegible] concerned, as well as [illegible] ...nts; [illegible] to [illegible] ...pla- [illegible] the adoption; and above all the non-production of any account of expenditure at the ceremony, which, if his witnesses spoke the truth, must

Page.

Page.

Page.

Page.

ather mort- was ssity, y the mortgage was tainted with immorality.

Held by STANLEY, C J, and KNOX and AIKMAN, JJ, that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BANERJI, J., (RICHARDS, J. concurring):—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father in the irred at erior to enforce he debt son to not his pious duty to discharge it.

The following cases were referred to:—*Debi Dat* v. *Jadu Rai*, I. L. R., 24 All, 459, *Jamna* v. *Nain Sukh*, I. L. R, 9 All, 493, *Badri Prasad* v. *Madan Lal*, I. L. R, 15 All., 75, *Lal Singh* v. *Deo Narain Singh*, I. L. R., 8 All., 279, *Manbahal* v. *Gopal Misra*, Weekly Notes, 1901, p 57, *Hanuman Kamat* v. *Daulat Mundar*, I. L. R., 10 Calc., 525, *Ram Dayal* v. *Ajudhia Prasad*, I. L. R., 28 All., 328, *Surji Prasad* v. *Golab Chand*, I. L. R, 27 Calc., 762,

R, 26 Bom., 326, *Chidambara Mudaliar* v. *Koothaperumal*, I. L. R., 27 Mad., 326, *Sami Ayyangar* v *Ponnamal*, I. L. R, 21 Mad., 28, *Luchmun Dass* v. *Giridhur Chowdhry*, I. L. R., 5 Calc., 855, *Khalil-ul-Rahman* v. *Gobind Pershad*, I. L. R, 20 Calc, 328, *Maheswar Dutt Tewari* v. *Kishun Singh*, I. L. R, 34 Calc., 184, *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*, I L. R., 34 Calc, 735, *Balgobind Das* v. *Narain Lal*, I. L. R., 15 All., 339, *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A., 181, *Madho Parshad* v. *Mehrban Singh*, L. R 17 I. A., 194, *Beni Madho* v. *Basdeo Patak*, I. L. R., 12 All., 99, *Mahabir Pershad* v. *Makeswar Nath Sahai*, I. L. R., 17 Calc, 584, *Sita Ram* v. *Zalim Singh*, I. L R., 8 All., 231, *Kishan Lal* v. *Garuruddhwaja Prasad Singh*, I. L. R., 21 All., 238, *Chail Behari Lal* v. *Gulzari Mal*, 6 A. L. J., 133, *Kallu* v. *Fateh*, 1 A. L. J, 316, *Chintamanray Mehendale* v. *Kashinath*, I. L. R., 14 Bom., 320, *Bhawani Bakhsh* ...m, I. L R., 50, *Ganga* nd *Bhag-*

Chandradeo Singh v. Mata Prasad 176

Page.

Page.

Page.

Page.

Page.

SUIT *against two defendants—Decree against one—Appeal by defendant made liable—No appeal against the other defendant—Appellate Court's finding against the defendant against whom the suit was dismissed.*] A suit for money was instituted against A and K. The Court of first instance held that A was liable and dismissed the suit against K. A appealed, but did not make K a party to it. The Lower Appellate Court found that K was liable and not A, and decreed A's appeal. *Held* that no decree could be passed against K, as the plaintiff had

Page.

Page.

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JANUARY 1909.

(Pages 1—41.)

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Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*

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Act VII of 1870 (Court Fees), as modified up to 1st October, 1908 ... Re. 1. (1 *a*)

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Act II of 1899 (Stamps), as modified up to 1st March, 1907 ... ... Re. 1 (2 *a*)

Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February 1908 ... ... 2 *a.* 6 *p.* (1 *a.*)

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Act XVI of 1873 Village and Road, Police, United Provinces)	In Urudu, 1 a. (1 a.)
Act IX of 1874 (European Vagrancy)	In Urdu, 2 a. (1 a.)
Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1906 ...	In Urdu. 3 a. 9 p. (1 a 6 p.)
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Act XVIII of 1876 (Oudh Laws)	In Urdu. 2 a (1 a)
Act I of 1878 (Opium), as modified up to 1st October, 1907	In Urdu. 1 a. 6 p (1 a.)
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TABLE OF CASES REPORTED.

Page.

FULL BENCH.

APPELLATE CIVIL.

REVISIONAL CIVIL.

MISCELLANEOUS CIVIL.

REVISIONAL CIVIL.

TABLE OF CASES CITED.



INDEX.

THE INDIAN LAW REPORTS, Allahabad Series.

MISCELLANEOUS CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

ATWARI AND ANOTHER (OBJECTORS) *v.* MAIKU LAL (OPPOSITE PARTY).*

Civil Procedure Code, section 223—Execution of decree—Decree of Court of Small Causes transferred for execution to a Munsif—Appeal.

A decree of a Court of Small Causes was transferred for execution under section 223 of the Code of Civil Procedure to the Munsif's Court because the decree-holder sought in execution to bring to sale immovable property of the judgment-debtor. *Held* that an order in execution of such decree passed by the Munsif was appealable to the District Judge.

IN this case a decree was passed by a Court of Small Causes in a suit cognizable by such Court. The decree-holder sought in execution to attach and bring to sale immovable property of his judgment-debtor, and, inasmuch as the Court of Small Causes had no jurisdiction to sell immovable property, the decree was sent for execution to the Court of the Munsif. There certain objections were raised by the judgment-debtor. The objections were overruled, and the judgment-debtor appealed to the District Judge. Before the District Judge the question was raised whether any appeal lay to his Court, and on this point the District Judge referred the case to the High Court under the provisions of section 617 of the Code of Civil Procedure.

The parties were not represented.

STANLEY, C. J., and BANERJI, J.—This is a reference by the learned District Judge of Farrukhabad under section 617 of the Code of Civil Procedure. The facts are these:—A decree was made by a Court of Small Causes in a suit cognizable by that Court. As the decree-holder sought to realize the amount of the decree by attachment and sale of immovable property, the

* Miscellaneous No. 203 of 1903.

1908

Patwari v. ...ku Lal.

Court of Small Causes sent the decree to the Munsif's Court for execution under the provisions of section 223 of the Code of Civil Procedure. An application for execution was accordingly made in the Munsif's Court. Objections were raised on behalf of the judgment-debtor. Those objections having been overruled, the judgment-debtor appealed to the District Judge. In his Court the question was raised whether an appeal lay from the order of the Munsif. It was contended before him that as the suit was of the nature cognizable in a Court of Small Causes the proceedings in execution taken in the Munsif's Court should be deemed to be proceedings in a Small Cause Court suit and were therefore final. The fallacy which underlies this contention is that in the present case the suit was not transferred to the Munsif's Court, nor were execution proceedings pending in the Small Cause Court transferred to the Munsif's Court, but the decree was sent under section 223 of the Code, as immovable property was sought to be sold. Had the suit or the execution proceedings been transferred to the Munsif's Court under section 25 of the Code of Civil Procedure, or had the execution proceedings been instituted in the Munsif's Court under section 35 of the Provincial Small Cause Court's Act, the proceedings in the Munsif's Court might be regarded as proceedings held by a Court of Small Causes But this was not so. The Court of Small Causes had no jurisdiction to sell immovable property, and for this reason the decree was sent to the Munsif's Court in order that execution proceedings might be held in that Court. The order passed by the Munsif was an order which he might have passed in a suit instituted in his Court. From such an order an appeal ordinarily lay to the District Judge, and therefore in the present case the appeal preferred in the Court of the District Judge could in our judgment be entertained. Section 27 of the Small Cause Court's Act has no application to a case of this kind. This is our answer to the reference.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHANDAR SHEKHAR (PETITIONER) *v.* KUNDAN LAL AND ANOTHER (OPPOSITE PARTIES).*

Partition—Compromise—Right of co-owners to partition—Effect of agreement to remain joint.

By a compromise entered into in the course of proceedings for partition it was agreed that the share of the applicant for partition alone should be partitioned, that of the non-applicants remaining joint. *Held* that although such compromise might prevent the non-applicants from obtaining partition in the course of the proceedings during which it was entered into, it could not prevent either of them from subsequently making a fresh application for partition *inter se.*

THE facts of this case are as follows:—

Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram were four brothers jointly entitled to certain property. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar, the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1906, the plaintiff Chandar Shekhar made an application for partition of his share, which application was rejected on the ground that it was barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that inasmuch as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it was not open to him to institute proceedings for partition. Against this decision the applicant for partition appealed to the High Court.

Munshi *Gokul Prasad,* for the appellant.

The respondents were not represented.

STANLEY, C.J., and BANERJI, J.—This appeal is against an order of an Assistant Collector whereby he rejected the application

* First Appeal No 285 of 1906, from a decree of Asghar Ali, Assistant Collector of Meerut, dated the 24th of July 1906.

1908

ATWARI v. MAIKU LAL.

Court of Small Causes sent the decree to the Munsif's Court for execution under the provisions of section 223 of the Code of Civil Procedure. An application for execution was accordingly made in the Munsif's Court. Objections were raised on behalf of the judgment-debtor. Those objections having been overruled, the judgment-debtor appealed to the District Judge. In his Court the question was raised whether an appeal lay from the order of the Munsif. It was contended before him that as the suit was of the nature cognizable in a Court of Small Causes the proceedings in execution taken in the Munsif's Court should be deemed to be proceedings in a Small Cause Court suit and were therefore final. The fallacy which underlies this contention is that in the present case the suit was not transferred to the Munsif's Court, nor were execution proceedings pending in the Small Cause Court transferred to the Munsif's Court, but the decree was sent under section 223 of the Code, as immovable property was sought to be sold. Had the suit or the execution proceedings been transferred to the Munsif's Court under section 25 of the Code of Civil Procedure, or had the execution proceedings been instituted in the Munsif's Court under section 35 of the Provincial Small Cause Court's Act, the proceedings in the Munsif's Court might be regarded as proceedings held by a Court of Small Causes But this was not so. The Court of Small Causes had no jurisdiction to sell immovable property, and for this reason the decree was sent to the Munsif's Court in order that execution proceedings might be held in that Court. The order passed by the Munsif was an order which he might have passed in a suit instituted in his Court. From such an order an appeal ordinarily lay to the District Judge, and therefore in the present case the appeal preferred in the Court of the District Judge could in our judgment be entertained. Section 27 of the Small Cause Court's Act has no application to a case of this kind. This is our answer to the reference.

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CHANDAR SHEKHAR (PETITIONER) v. KUNDAN LAL AND ANOTHER (OPPOSITE PARTIES).*

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THE facts of this case are as follows:—

Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram were four brothers jointly entitled to certain property. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar, the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1906, the plaintiff Chandar Shekhar made an application for partition of his share, which application was rejected on the ground that it was barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that inasmuch as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it was not open to him to institute proceedings for partition. Against this decision the applicant for partition appealed to the High Court.

Munshi *Gokul Prasad*, for the appellant.

The respondents were not represented.

STANLEY, C.J., and BANERJI, J.—This appeal is against an order of an Assistant Collector whereby he rejected the application

* First Appeal No. 235 of 1906, from a decree of Asghar Ali, Assistant Collector of Meerut, dated the 24th of July 1906.

1908

CHANDAR SHEKHAR v. KUNDAN LAL.

of the plaintiff for partition of certain property. There were four brothers jointly entitled to certain property. They were Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1901 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1906, the plaintiff made the application out of which this appeal has arisen for partition of his share, and his application has been rejected on the ground that it is barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that, inasmuch as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it is not open to him to institute proceedings for partition. We may mention that the plaintiff in the previous proceedings applied for partition of his share under section 110 of Act III of 1901, but his application was rejected on the ground that it had not been brought within 60 days, the period allowed for such application. So far as regards the former proceedings, no doubt, the plaintiff could not take advantage of the order for partition and obtain partition of his share, but this only applied to the proceedings then pending. It in no way prevented him from instituting a fresh application for the separation of his share, and the partition of the property remaining joint. The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right and therefore *not enforceable. In the present case* there was no agreement not to claim partition. Therefore in our opinion the learned Assistant Collector was wrong in rejecting the plaintiff's claim. As he disposed of the case upon a preliminary point, we set aside his order and remand the case to him under the provisions of section 562 of the Code of Civil Procedure, with directions

that it be reinstated in the file of pending applications and be disposed of according to law. The plaintiff appellant will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

LALTA PRASAD (PLAINTIFF) *v* SALIG RAM AND ANOTHER (DEFENDANTS).*

Will—Construction of document—Persona designata.

By the terms of a will the testator gave all his property to his wife for her life, and then declared that after her death Lalta Prasad, his adopted son, should be owner of the property. The testator's wife predeceased him. *Held* that after the death of the testator Lalta Prasad took as a *persona designata*, whether in fact his adoption was valid or not. *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1) followed.

THE facts out of which this appeal arose are as follows:—

One Kedar Nath died on the 3rd of September 1904 leaving a will, dated the 22nd of June 1888. By this will the testator gave all his property to his wife for her life, and then declared that after her death Lalta Prasad, his adopted son, should be the owner *(malik)* of the property. The testator's wife predeceased him, and upon the death of the testator his sister's sons took possession of the property. Lalta Prasad then brought the present suit to recover the estate of Kedar Nath as sole legatee thereof. The Court of first instance (Munsif of Pilibhit) held that the plaintiff was entitled as *persona designata*, whether he was or was not in fact the adopted son of Kedar Nath, and accordingly decreed the claim. This decree was, however, reversed by the Subordinate Judge of Bareilly upon the ground that the gift to the plaintiff was made to him as adopted son and that he had failed to prove his adoption. The plaintiff thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

STANLEY, C. J, and BANERJI, J.—The meaning of a gift in the will of one Kedar Nath is the only question in this appeal. Kedar Nath made a will on the 22nd of June 1888.

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* Second Appeal No. 971 of 1907 from a decree of Giraj Kishor Datt, Subordinate Judge of Bareilly, dated the 4th of July 1907, reversing a decree of Raman Das, Munsif of Pilibhit, dated the 8th of September 1906.

(1) (1876) L. R., 3 I. A., 253.

1908

LALTA PRASAD v. SALIG RAM.

The will is very simple in its character. By it he gave to his wife all his property for her life, and after her death he declared that Lalta Prasad, his adopted son, should be the *malik*, or owner, of the property. The testator's wife predeceased him. He died on the 3rd of September 1904, and upon his death the defendants, who are his sister's sons, took possession of his property. Thereupon the suit out of which this appeal has arisen was instituted by Lalta Prasad. He claimed the property under the gift contained in the will of Kedar Nath. The Court of first instance held that he was entitled to it as *designata persona* under the will, and that it was immaterial to find whether or not he was the adopted son of Kedar Nath. It did, however, consider that question and came to the conclusion that the adoption was proved. On appeal the lower appellate Court held that the will was genuine, but the adoption of the plaintiff was not proved, and it reversed the decision of the Court below, on the ground that the gift made to the plaintiff was so made to him not as a *persona designata* but as an adopted son, and that inasmuch as he had failed to prove his adoption, the gift failed, and it therefore dismissed the plaintiff's suit. The construction of the will appears to us to be extremely simple. After the death of the widow, the testator gave his property to Lalta Prasad by name and then described him as an adopted son. There is absolutely nothing in the will to show that the fact of the adoption of the plaintiff was the motive or reason for the gift, and, in the absence of anything of the kind, it appears to us that, interpreting the language of the gift in its ordinary meaning, we must treat it as a gift to Lalta Prasad as a *persona designata*, and that therefore the gift is valid. This case appears to resemble the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1) and to be governed by the decision in that case. We therefore allow the appeal. We set aside the decree of the lower appeal Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

(1) (1870) L. R., 3 I. A., 253.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji,
SRIDHAR RAO (PLAINTIFF) *v.* RAM LAL (DEFENDANT).*

1908
August 5

Civil Procedure Code, section 440—Minor suing through next friend other than certificated guardian—Permission of Court presumed—Procedure.

A minor who had a certificated guardian living instituted a suit through a next friend other than the guardian. On the application of the next friend notice was sent to the certificated guardian, but he showed no cause, and the suit continued. *Held* that under the circumstances, although no formal order had been recorded permitting the next friend to act on the minor's behalf, it must be presumed that the intention of the Court had been to grant such permission, and the suit ought not to be defeated solely upon the ground that no formal permission had been recorded.

IN this case a suit was instituted by a minor through one Sada Sheo Rao as his next friend. At the time of the institution of the suit there was in existence a certificated guardian of the minor appointed under Act No. VIII of 1890, one Madho Rao. On the application of the next friend the Court (Subordinate Judge of Jhansi) issued notice to the certificated guardian to show cause why the person nominated as next friend of the minor should not be permitted to carry on the suit in that capacity. The suit was one in which the minor sought to set aside the sale of a mortgage deed standing in the minor's name by his certificated guardian to one Ram Lal and a subsequent decree obtained by Ram Lal on the mortgage. No cause was shown by the certificated guardian in answer to the notice served upon him, and the suit proceeded with Sada Sheo Rao as next friend although no formal order was made by the Court permitting him to act as such. The suit was transferred to the Court of the District Judge, where, after all the evidence had been recorded, the defendant took an objection that the suit must fail for want of compliance with the provisions of section 440 of the Code of Civil Procedure. The District Judge sustained this objection and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Harendra Krishna Mukerji*, for the appellant.

The Hon'ble *Pandit Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondent.

STANLEY, C.J., and BANERJI, J.—The suit which has given rise to this appeal was brought on behalf of a minor for the

* First Appeal No. 28 of 1907 from a decree of H. E. Holme, District Judge of Jhansi, dated the 7th of January 1907.

1908

SRIDHAR RAO v. RAM LAL.

avoidance of a sale-deed executed by his certificated guardian. The plaint in the suit was filed by a person who described himself as the next friend of the plaintiff As he was not the certificated guardian, the Court ordered notice to issue to the certificated guardian as required by section 440. This order was passed on an application made by the next friend who instituted the suit on behalf of the minor. Notice was served on the certificated guardian, but he showed no cause. The Court then proceeded to settle issues, and recorded some evidence, but no formal order was recorded granting leave to the new next friend to institute the suit. The case was transferred to the Court of the learned District Judge, and before him an objection was taken to the effect that as no leave had been granted under section 440, the suit was not maintainable. This objection prevailed in the Court below, and the suit has been dismissed. The learned Judge was of opinion that leave to institute the suit ought to have been formally granted and recorded. Section 440 requires that if a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian, except with the leave of the Court granted after notice to such guardian. As we have said above, notice was issued to the certificated guardian as required by the section; it was served on him, but he did not appear and show cause. It is true that no formal order granting leave was recorded by the Court, but, as the Court framed issues and examined witnesses, it must be presumed that the Court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf. The Court below was therefore wrong in dismissing the suit. As the suit was dismissed upon a preliminary ground, and in our opinion that ground cannot be supported, we set aside the decree of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register, and dispose of it on the merits. The appellant will have the costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
August 13.

AKBAR KHAN AND ANOTHER (PLAINTIFFS) v. TURABAN (DEFENDANT)*

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 120—Suit for declaration of title—Cause of action—Limitation.

The plaintiffs sued in 1904 asking for a declaration that they were entitled to certain property mentioned in the plaint. Their cause of action was that the name of the defendant had in the year 1895 been entered in the revenue papers in respect of the property in suit. *Held* that the suit was barred by limitation, and that the fact that the defendant had in 1903 resisted the plaintiffs in an attempt to obtain correction of the khewat did not give the plaintiffs a fresh cause of action. *Legge v. Ram Baran Singh* (1) followed. *Ilahi Bakhsh v Harnam Singh* (2) distinguished.

THIS was a suit, instituted in 1904, for a declaration that the plaintiffs were entitled to certain property mentioned in the plaint. Their cause of action was that in 1895 the name of the defendant had been entered in respect of the property in suit in the revenue papers and the plaintiffs' title was denied. The Court of first instance (Additional Munsif of Meerut) decreed the claim; but on appeal the Additional District Judge reversed this decision and dismissed the suit as barred by limitation. The plaintiffs appealed to the High Court urging that in 1903 the plaintiffs had applied for correction of the khewat and in such application were opposed by the defendant, and that this gave rise to a fresh cause of action in favour of the plaintiffs.

Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *Abdul Raoof*, for the respondent.

STANLEY C.J., and BANERJI, J.—The question in this appeal is whether the plaintiffs' claim is barred by limitation. The suit is one for a declaratory decree. The plaintiffs asked for a declaration that they were entitled to the property mentioned in the plaint. In 1895 the name of the defendant was entered in the revenue papers in respect of this property and the title of the plaintiffs was denied. The lower appellate Court has held that the plaintiffs' cause of action for a declaratory suit accrued when this entry was made in 1895, and, as held, by the Full Bench in *Legge* v. *Ram Baran Singh* (1) six years'

* Second Appeal No. 1114 of 1907 from a decree of G. C. Badhwar, Additional Judge of Meerut dated the 1st of August 1907, reversing a decree of Ram Chandar, Additional Munsif of Meerut, dated the 30th of September 1905.

(1) (1897) I. L. R., 20 All., 35. (2) Weekly Notes, 1898, p. 215.

1908

AKBAR KHAN v. TURABAN.

limitation applies to the suit and must be computed from the year 1895. We think this view of the Court below is right. According to the Full Bench ruling referred to above, where the plaintiff is in possession and asks for a declaratory decree, the limitation applicable to the suit is that prescribed by article 120 of schedule II to the Limitation Act, and should be computed from the date on which his cause of action arose. In the present case the plaintiffs' cause of action is the entry of the defendant's name in the revenue papers in respect of the property in suit in 1895. As the suit was brought after the expiry of six years from that year, it is time-barred. It is contended on behalf of the appellants that a fresh cause of action accrued to them in 1903 when the defendant objected to the correction of the khewat. That in our opinion was not a fresh cause of action. The refusal to have the entry corrected was a continuation of the original cause of action, namely, the entry of the defendant's name in the revenue papers in 1895. In the case of *Ilahi Bakhsh* v. *Harnam Singh* (1) and S. A. No. 263 of 1907 (unreported), *Robert Skinner* v. *Shanker Lal*, decided by a Bench of this Court on the 27th of May 1908*, there was a fresh invasion of the plaintiffs' right, and that was held to have given him a fresh cause of

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* The judgment in this case was as follows. —

[illegible]

tion. In appeal the decree of the first Court was affirmed The plaintiffs come here in second appeal

The Courts below reckoned as the starting point the order of the Settlement Officer referred to above. No doubt the plaintiffs might, upon this order being made have instituted a suit for a declaratory decree, but in our opinion they were not bound to do so. The defendant might have taken no steps to enforce any right under the order of the 5th of May 1899, but when he did so plaintiffs in our opinion got a fresh cause of action for asking for a declaratory decree [illegible] within the last parag[illegible] w this appeal; set a[illegible] case under the provis[illegible] Code of Civil Procedure through the lower appellate Court [illegible] to readmit it [illegible] d dispose of it [illegible] Other costs [illegible]

(1) Weekly Notes, 1893, p. 216.

action. As in the present case there was no fresh invasion of the right of the plaintiffs, the rulings referred to are inapplicable. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1908
November 6.

Before Mr. Justice Richards and Mr. Justice Griffin.

JOTI PRASAD (PLAINTIFF) *v.* AZIZ KHAN AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—Suit for sale on a mortgage—Parties.

In a suit for sale on a mortgage the ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1), *Mon Mohini Ghose* v. *Parvati Nath Ghose* (2) and *Khairati Lal* v. *Banni Begam* (3) referred to.

THIS was a suit for sale upon a mortgage executed on the 10th August 1888 by one Karam Khan. The defendants were the sons, daughters and widow of Karam Khan, who had died before suit. The mortgage deed described the property mortgaged as the mortgagor's personal share in his possession. Its execution was admitted by the defendants; but they alleged that the property mortgaged originally belonged to one Salahi, the father of Karam Khan, and that there were other heirs of Salahi besides the mortgagor. In paragraph 2 of the additional pleas in the written statement it appeared that the mortgage was a mortgage of the entire property and that the mortgagees had been realizing the profits from the tenants. The Court of first instance (Subordinate Judge of Saharanpur), finding that Karam Khan was entitled to a two-fifths share only in the property mortgaged, gave the plaintiff a decree for sale to that extent only. The plaintiff appealed and his appeal was dismissed by the District Judge. The plaintiff thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji* and Lala *Girdhari Lal Agarwala,* for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

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* [illegible]

(1) (1906) I. L. R., 33 Calc., 425 (2) (1905) I. L. R., 32 Calc., 746.
(3) Weekly Notes, 1908, p. 100.

1908

JOTI PRASAD
v.
AZIZ KHAN.

RICHARDS and GRIFFIN, JJ.—The plaintiff sued on a mortgage executed on the 10th of August 1888 by one Karam Khan. The deed specified the property mortgaged, which was described in the body of the document as the mortgagor's personal share in his possession. This mortgage was set out in paragraph 1 of the plaint, which was admitted in the written statement filed by the defendants, who are the sons, daughters and widow of Karam Khan, the executant. In the last paragraph of the written statement it is alleged that the property mortgaged originally belonged to one Salahi, father of Karam Khan, and that there were other persons besides Karam Khan who were heirs to Salahi. On the other hand in paragraph 2 of the additional pleas of the written statement it appears that the mortgage was a mortgage of the entire property and that the mortgagees had been realizing the profits from the tenants. The Court of first instance finding that Karam Khan was entitled to a two-fifths share only in the property mortgaged gave the plaintiffs a decree for sale of a two-fifths share of the property mortgaged. The plaintiff appealed, and his appeal was dismissed by the lower appellate Court. The sisters and another person said to be interested in the property were not joined as parties. The plaintiff appeals to this Court, and it is contended that on a true construction of the mortgage deed he was entitled to a decree for the sale of the entire property mortgaged, and that the defendants who stand in the shoes of Karam Khan cannot be allowed to say that Karam Khan had no power to mortgage the entire property. We think that this latter contention is well founded. If Karam Khan were alive, he would not be permitted to plead that he had no authority to mortgage the property which he purported to mortgage. The defendants, who are his representatives, cannot stand in a better position. The sisters of Karam Khan may or may not have rights in the property in suit, and we do not know whether they lay claim to any such rights. As they are not parties to this suit, their rights are not affected by the decree in this case. It is contended that having regard to the provisions of section 85 of the Transfer of Property Act, it was obligatory on the plaintiff to join them as parties. According to the deed of mortgage the sisters of Karam Khan had no interest in the mortgaged property. The defendants, as said

above, cannot be allowed to set up a defence which Karam Khan could not have pleaded. In this connection we would refer to the ruling in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) in which Mookerjee, J., held "that the ordinary rule is that the plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee." Much to the same effect is the ruling in *Mon Mohini Ghose* v. *Parvati Nath Ghose* (2). The same principle was followed in *Khairati* v. *Banni Begam* (3). We think that in this case the plaintiff was entitled to a decree for sale of the entire property. We allow the appeal, and, setting aside the decrees of the Courts below in so far as they dismissed the plaintiff's claim in respect of a three-fifths share of the property mortgaged, decree the plaintiff's claim against the entire property mortgaged. The appellant will get his costs from the respondents.

1903

JOTI PRASAD v. AZIZ KHAN.

Appeal decreed.

FULL BENCH.

1908
November 9.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Richards.

SADAR-UD-DIN AHMAD AND OTHERS (PLAINTIFFS) v. CHAJJU AND OTHERS (DEFENDANTS).*

Mortgage—Compromise in course of mutation proceedings purporting to vary the terms of a registered deed.

Held that a compromise entered into between the parties to mutation proceedings before a Court of Revenue which purported to modify the conditions of a pre-existing mortgage, upon the basis of which mutation was sought, could not be allowed to take effect in opposition to the distinct terms of the registered instrument of mortgage. *Nur Ali* v. *Imaman* (4) distinguished. *Raghubans Mani Singh* v. *Mahabir Singh* (5) and *Pranal Anni* v. *Lakhshmi Anni* (6) referred to by Banerji and Richards, J J.

ONE Chajju executed a mortgage of certain property in favour of Husain Bakhsh and Nathu to secure a principal sum of

* Second Appeal No. 1332 of 1907, from a decree of Soti Raghubans Lal, Additional Judge of Meerut, dated the 12th of July 1907 reversing a decree of Rama Das, Munsif of Mozaffarnagar, dated the 14th of March 1907.

(1) (1906) I. L. R., 33 Calc., 425.
(2) (1905) I. L. R., 32 Calc., 746.
(3) Weekly Notes, 1908, p. 100.
(4) Weekly Notes, 1884, p. 40.
(5) (1905) I. L. R., 28 All., 78.
(6) (1899) I. L. R., 22 Mad., 508.

1908

SADAR-UD-DIN AHMAD v. CHAJJU.

Rs. 1,000, the mortgage being expressed to be made for a term of 25 years. In the mortgage there was a provision to the effect that on payment of the amount due in the month of *Jeth* after the expiry of the term of 25 years the mortgage might be redeemed. The mortgagors refused to register the mortgage, and thereupon an application was made by the mortgagees for compulsory registration, and compulsory registration was effected. Subsequently the mortgagees applied for mutation of names in the mutation department To this, not merely Chajju, but another person named Abdulla objected. Abdulla was no party to the mortgage, but claimed to be entitled to a share in the mortgaged property, and hence he objected to mutation of names so far at least as regarded his share. The dispute was compromised, the terms of the compromise being that the whole of the property should be recorded as subject to the mortgage and that the names of the mortgagees should be entered as mortgagees in respect of it and the names of Chajju and Abdulla as mortgagors. It further provided that the mortgagors should have power in any *Jeth* to pay the mortgage debt and have the mortgage redeemed. The mortgagors sought redemption in pursuance of the terms of this compromise within the period of 25 years, and this was refused. They then filed the present suit for redemption. The defence to the suit was that it was premature, having been brought within the term of 25 years. The first Court (Munsif of Muzaffarnagar) gave a decree for redemption, but upon appeal the lower appellate Court (Additional Judge of Meerut) reversed the decree of the Court of first instance on the ground that the terms of the compromise in the Revenue Court varied the terms of the mortgage, and the agreement not having been registered was not admissible in evidence and could not be treated as giving the mortgagor a power to redeem contrary to the express provision of the mortgage deed. From that decision the plaintiffs appealed to the High Court.

Mr. *Abdul Raoof*, for the appellants, contended that the compromise was binding on the parties. The objection to mutation was withdawn only upon the ground that the mortgage could be redeemed within 25 years. The Revenue Court had power

to go into the question of title, and it gave effect to the compromise. It was not necessary to register a compromise put in before a court in a judicial proceeding. He referred to *Nur Ali* v. *Imaman* (1), *Raghubans Mani Singh* v. *Mahabir Singh* (2) and *Pranal Anni* v. *Lakhsmi Anni* (3).

Babu *Jogindro Nath Chaudhri* (with whom Pandit *Moti Lal Nehru*), for the respondents, contended that under the terms of the original deed the mortgage could not be redeemed before the expiry of 25 years. The compromise purporting to remove that restriction should have been registered. As it was the compromise could not be admitted in evidence for the purpose of varying the terms of the mortgage. This compromise was an „ instrument" (Wharton's Law Lexicon referred to) being a petition embodying the terms of an agreement. Its registration was compulsory under the Indian Registration Act 1877. Mutation proceedings could not be called judicial proceedings. A judicial proceeding was one in which contested questions of right, title, or liability were determined. In this case the Revenue Court simply effected mutation of names according to the compromise. It had no power to give effect to any of the conditions of the compromise affecting right, title, interest or liability. In other words, the Revenue Court as such could not take judicial notice of the several terms of the compromise: it could only order mutation of names.

STANLEY, C. J.—The facts of this case are these. One Chajju executed a mortgage of certain property in favour of Husain Bakhsh and Nathu to secure a principal sum of Rs. 1,000, the mortgage being expressed to be made for a term of 25 years. In the mortgage there is a provision for redemption. The redemption clause provides that on payment of the amount due in the month of *Jeth* after the expiry of the term of 25 years the mortgage might be redeemed. The mortgagors refused to register the mortgage, and thereupon an application was made by the mortgagees for compulsory registration and compulsory registration was effected. Subsequently the mortgagees applied for mutation of names in the mutation department. To this, not

(1) Weekly Notes, 1884, p. 40. (2) (1905) I. L. R., 28 All., 78,
(3) (1899) I. L. R., 22 Mad., 508.

1908

SADAR-UD-DIN AHMAD v. CHAJJU

merely Chajju, but another person named Abdulla objected. Abdulla, it will be noted, was no party to the mortgage. He claimed to be entitled to a share in the mortgaged property, and hence he objected to mutation of names so far at least as regarded his share. The dispute was compromised, the terms of the compromise being that the whole of the property should be recorded as subject to the mortgage and that the names of the mortgagees should be entered as mortgagees in respect of it and the names of Chajju and Abdulla as mortgagors. It further provided that the mortgagors should have power in any *Jeth* to pay the mortgage debt and have the mortgage redeemed. The mortgagors sought redemption in pursuance of the terms of this compromise within the period of 25 years, and this was refused, and hence the suit for redemption out of which this appeal has arisen.

The defence to the suit was that it was premature having been brought within the term of 25 years.

The first Court gave a decree for redemption, but upon appeal the lower appellate Court reversed the decree of the Court of first instance on the ground that the terms of the compromise in the Revenue Court varied the terms of the mortgage and the agreement not having been registered was not admissible in evidence and could not be treated as giving the mortgagor a power to redeem contrary to the express provision of the mortgage deed. From that decision the present appeal has been preferred, and it was laid before a Bench of three Judges in view of the decision in the case of *Nur Ali* v. *Imaman* (1) the correctness of which the Court before whom the appeal came was disposed to doubt.

It appears to me that the decision of the learned Additional Judge is correct. The compromise entered into in the mutation proceedings could not in my opinion have the effect of modifying or altering in any way the terms of the registered mortgage. The Revenue Court was concerned with the entry of names only and had no concern with the conditions upon which the objectors withdrew their opposition to the granting of the application for mutation. The compromise was not in fact submitted to the

(1) Weekly Notes, 1884, p 40.

Revenue Court further than as showing the withdrawal of opposition to the mutation of names. The language of the order of the Court shows this. The Revenue Court in view of the withdrawal of opposition simply ordered that mutation should have effect. The words are "the parties have compromised and mutation will take place accordingly." The case appears to me to be unlike that of *Nur Ali* v. *Imaman* (1). It would be fraught with danger to the security afforded to titles by the Registration Act if a compromise of parties in proceedings taken before a Revenue Officer for mutation of names could be regarded as having the effect which is contended for here of creating a charge and modifying the provisions of a registered document. I would therefore dismiss the appeal.

BANERJI, J.—I am of the same opinion. It is obvious from the term's of the mortgage of the 8th of August 1903 that it cannot be redeemed before the expiry of 25 years from the date of it. Those terms could not be varied except by a registered instrument. By the application presented in the mutation case the Revenue Court holding mutation proceedings was merely informed of an oral contract entered into by the parties. The application itself cannot be treated as creating a fresh mortgage. Can it be taken into consideration as evidencing an alteration in the terms of the original mortgage? I agree with the learned Chief Justice for the reasons stated by him that it cannot be admitted in evidence. I think the case of *Nur Ali* v. *Imaman Ali* (1) is distinguishable. We were pressed with the decision in *Raghubans Mani Singh* v. *Mahabir Singh* (2), to which I was a party. That was a case to which in our judgment the observations of their Lordships of the Privy Council in *Pranal Anni* v. *Lakhshmi Anni* (3), as contained in page 514 of the report, fully applied. In the present case the terms of the compromise were not referred to or narrated in the order of the Revenue Court, and indeed for purposes of mutation it was not necessary to refer to the terms of the mortgage or the conditions under which redemption could take place. This case therefore is not governed by the rulings to which I have referred. I also would dismiss the appeal.

(1) Weekly Notes, 1884, p. 40. (2) (1905) I. L. R., 28 All. 78.
(3) (1899) I. L. R., 22 Mad., 508.

1908

SADAR-UD-DIN AHMAD v. CHAJJU.

RICHARDS, J.—This was a suit for redemption of a mortgage, dated the 8th August 1903. The mortgage was a mortgage with possession, and it is quite clear that according to the terms of the deed the mortgage could not be redeemed until after the expiration of 25 years. It is contended on behalf of the plaintiff that the terms of the mortgage deed were subsequently varied by agreement between Chajju, the mortgagor, and Abdulla on the one side and the mortgagees on the other side, whereby it was arranged that Abdulla should be bound by the mortgage, but that the mortgage should be redeemable by payment of the mortgage debt in any year in the month of *Jeth*. The defendants objected that such an arrangement could only be proved by a duly registered document. No such document exists, but the plaintiffs contend that the petition to and the order of the Revenue Court referred to by the Chief Justice operate to vary the terms of the mortgage deed and that a registered document was not necessary. I quite agree in the judgment of the learned Chief Justice and I should not deem it necessary to add anything to what he has said save for the fact that reliance was placed on the ruling in *Raghubans Mani Singh* v. *Mahabir Singh* (1) to which I was a party. In that case certain lands were claimed on the basis of an agreement of compromise in prior litigation, whereby the title to the lands in question had been expressly admitted. The Judge had received and acted on the compromise and incorporated it into his decree. My learned colleague and I held that the plaintiffs could rely on the decree incorporating the compromise and that a registered instrument was not necessary. The facts of the present case are very different. They amount to no more than this, namely, that the Revenue Court ordered the defendant's names to be recorded as mortgagees in possession, all opposition to the application being withdrawn. The facts in the present case much more nearly approach the facts in the case of *Pranal Anni* v. *Lakhshmi Anni* (2), in which their Lordships of the Privy Council held the unregistered deed of compromise inadmissible.

In the present case the plaintiffs in effect ask the Court to hold that the petition to the Revenue Court and its order

(1) (1906) I. L. R., 28 All., 78. (2) (1899) I. L. R., 22 Mad., 508.

1908

SADAR-UD-DIN AHMAD v. CHAJJU.

operated to create a fresh mortgage. To entertain such a contention would be a very serious extension of the ruling of this Court in *Raghubans Mani Singh* v. *Mahabir Singh* (1). I also would dismiss the appeal.

BY THE COURT:

The order of the Court is that the appeal be dismissed, but under the circumstances without costs.

Appeal dismissed.

APPELLATE CIVIL.

1908
November 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

PIARI LAL (PLAINTIFF) v. NAND RAM AND OTHERS (DEFENDANTS.)*

Civil Procedure Code, section 13—Res judicata—Suit for sale on a mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred.

A suit for sale on a mortgage was compromised on the terms that the mortgagee should accept a simple money decree for the amount of the mortgage debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgagee again sued for sale of the mortgaged property. *Held* that the suit was barred *Shibu Bera* v. *Chandra Mohan Jana* (2) followed. *Bhola Nath* v. *Muhammad Sadiq* (3) and *Madho Prasad* v. *Baij Nath* (4) distinguished.

The facts of this case are as follows:—

In the year 1880 the predecessors in title of some of the defendants and the other defendants executed a mortgage in favour of the predecessor of the plaintiff. A suit was brought upon this mortgage on the 21st of September 1882, in which a sale of the mortgaged property was claimed. The suit was compromised on the terms that a simple money decree only should be passed in favour of the plaintiff and such a decree was passed on the 27th of November 1882. The amount due to the plaintiff on foot of the compromise was, however, not satisfied, or at least not fully satisfied. Thereupon the plaintiff instituted a second suit for sale of the mortgaged property. The first

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* Second Appeal No. 488 of 1907 from a decree of J. H Cumming, Additional Judge of Aligarh, dated the 21st of January 1907 reversing a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 16th of July 1906.

(1) (1905) I. L. R., 28 All., 78
(2) (1906) I. L. R., 33 Calc., 849.
(3) (1903) I. L. R., 26 All., 223.
(4) Weekly Notes, 1905, p. 152.

1908

PIARI LAL
v.
NAND RAM.

Court (Subordinate Judge of Aligarh) decreed the claim, but upon appeal the lower appellate Court (Additional Judge of Aligarh) dismissed it, on the ground that it was barred by section 13 (explanation III) of the Code of Civil Procedure.

The plaintiff thereupon appealed to the High Court.

Mr. *B. E. O'Conor*, for the appellant.

Mr. *M. L. Agarwala* and Babu *Durga Charan Banerji*, for the respondents.

STANLEY, C.J., and BANERJI, J.—This appeal arises out of a suit for sale of mortgaged property. It was dismissed under the following circumstances as barred by section 13 of the Code of Civil Procedure. It appears that in the year 1880 the predecessors in title of some of the defendants and the other defendants executed a mortgage in favour of the predecessor of the plaintiff. A suit was brought upon this mortgage on the 21st of September 1882, in which a sale of the mortgaged property was claimed. The suit was compromised on the terms that a simple money decree only should be passed in favour of the plaintiffs and such a decree was passed on the 27th of November 1882. The events which happened subsequent to the date of this compromise it is unnecessary for the purposes of the decision of this appeal to detail, suffice it to say that the amount due to the plaintiff on foot of the compromise was not satisfied, or at least fully satisfied. Thereupon the suit out of which this appeal has arisen was instituted for sale of the mortgaged property. The first Court decreed the claim, but upon appeal the lower appellate Court dismissed it, on the ground that it was barred by section 13 (explanation III) of the Code of Civil Procedure. In that explanation it is laid down that any relief claimed in a plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. In view of this section the claim of the plaintiff in the first suit for sale of the mortgaged property must be deemed to have been refused, and therefore his right as mortgagee to have a sale of the mortgaged property became barred as a matter *res judicata*. In view of this section it is impossible to hold that a fresh suit for sale can be maintained, and therefore we think that the lower appellate Court rightly dismissed the plaintiff's suit. This view is supported by the decision of the

Calcutta High Court in the case of *Shibu Bera* v. *Chandra Mohan Jana* (1), the facts of which are admittedly on all fours with the facts of the present case. Our decision is in no way in conflict with the decision of Benches of this Court in the cases of *Bhola Nath* v. *Muhammad Sadiq* (2) and *Madho Prasad* v. *Baij Nath* (3). In both of these cases it will be found that in the suits originally instituted by the plaintiffs no claim was put forward for sale of the mortgaged property; the plaintiffs contented themselves with applying for simple money decrees. Section 13 therefore had no application. We therefore dismiss the appeal with costs.

Appeal dismissed.

1908
August 13.

Before Mr. Justice Banerji and Mr. Justice Richards.

JAGAR NATH SINGH AND OTHERS (DEFENDANTS) v. LALTA PRASAD AND ANOTHER (PLAINTIFFS) AND DWARKA PRASAD (DEFENDANT)*

Act No. IX of 1872 (Indian Contract Act), section 11—Minor—Act No 1 of 1872 (Indian Evidence Act), section 115—Estoppel—Effect of minor fraudulently representing himself to be of full age.

Whether or not the doctrine of estoppel applies to a contract entered into by a minor, where persons who are in fact under age by false and fraudulent misrepresentations as to their age induce others to purchase property from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold. *So held* by BANERJI, J. *Mohori Bibee* v. *Dharmodas Ghose* (4), *Brohmo Dutt* v. *Dharmodas Ghose* (5), *Ganesh Lala* v *Bapu* (6) and *Stikeman* v. *Dawson* (7) referred to.

RICHARDS, J, differed on the question of fact as to whether the plaintiffs had been induced by any misrepresentations of the defendants as to their ages to enter into the contract sought to be set aside.

THE plaintiffs in the suit out of which this and the connected appeal, No. 118, arose (Lalta Prasad and Bhuaneshri Prasad) were the sons of one Madho Prasad, whose paternal uncle was the plaintiff's guardian Dwarka Prasad. After the death of Madho Prasad in 1882, Dwarka Prasad applied for, and obtained in 1888, a certificate of guardianship of the persons and property of the plaintiffs, who were minors at the date of their father's

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* First Appeal No. 167 of 1906, from a decree of Srish Chander Bose, Officiating Subordinate Judge of Ghazipur, dated the 17th of April 1906.

(1) (1906) I. L. R., 33 Calc, 849.
(2) (1903) I. L. R., 26 All., 223.
(3) Weekly Notes, 1905, p 163
(4) (1903) I. L. R, 30 Calc, 539.
(5) (1898) I. L. R, 26 Calc, 381.
(6) (1895) I. L. R, 21 Bom., 198.
(7) (1847) 16 L. J. Ch., 205.

1908

JAGAR NATH SINGH v. LALTA PRASAD.

death. Madho Prasad and Dwarka Prasad jointly owned an 8 anna share in the village Kharaun, out of which Madho Prasad in his life time sold 2 annas 9 pies and Dwarka Prasad sold 2 annas 6 pies after Madho Prasad's death. The remaining 2 annas 9 pies was sold by the plaintiffs and Dwarka Prasad on the 28th of June 1899 to Jagar Nath Singh defendant and the predecessors in title of defendants Nos. 2 to 11. The present suit was brought to set aside this sale. The plaintiffs stated that they were minors at the date of the sale; that they were persons of weak intellect and inexperienced; that they executed the sale-deed under the influence of Dwarka Prasad, who is an extravagant man of dissolute habits; that they did not derive any benefit from the sale; that the sale was effected without any necessity and that they did not receive any part of the consideration for it. On these grounds they sought to set aside the sale and recover possession of the portion of the property sold of which the purchasers had obtained possession.

The defendants denied that the plaintiffs were minors at the date of the sale and asserted that the plaintiffs represented themselves to be of full age and thus induced them to purchase the property. They contended that the plaintiffs were estopped from maintaining the suit, and that in any case they were bound to make restitution of the amount of consideration for the sale. The Court of first instance (officiating Subordinate Judge of Ghazipur) found that the age of the plaintiffs was below 21 years on the date of the execution of the sale deed and that they were minors and incompetent to make the contract of sale. The Court accordingly, following the ruling of their lordships of the Privy Council in *Mohori Bibee* v. *Dharmo Das Ghose* (1), held the sale to be void. It, however, was of opinion that the plaintiffs had made fraudulent misrepresentations to the purchasers as to their age and that they benefited by the sale. It accordingly made a decree for possession on condition that the plaintiffs should refund so much of the consideration for the sale as represented the value of the share decreed to them.

Against this decree the defendants purchasers appealed to the High Court and the plaintiffs also appealed. The defendants

(1) (1903) I. L. R., 30 Calc., 539.

repeated the pleas advanced by them in the Court below. The plaintiffs contended that they were not liable to make any restitution.

Dr. *Tej Bahadur Sapru* (with whom Babu *Durga Charan Banerji*), for the defendants appellants, contended in the first instance that the evidence did not prove that the plaintiffs were in fact minors at the date of the sale. He next argued that if they were minors at the date of the sale they were estopped by their own conduct from setting up that plea in the present suit. There was no warrant for holding that the rule of estoppel contained in section 115 of the Evidence Act did not apply to minors, and in principle there was no reason why a minor should be treated as on a different footing from an adult so far as this section was concerned. A distinction should be made between a contract which rested upon an act of two parties, and an estoppel which was merely a rule of evidence and created no substantive right. He next urged that there was a fraudulent misrepresentation of their age made by the plaintiffs, and if they wished to have the sale set aside, they must refund the money which they had received. He submitted that whilst fraud was not necessarily a part of estoppel it always arose where, as here, an action for deceit would be maintainable. The following authorities were referred to:—Bigelow on Estoppel, pp. 599, 606 and 607; Taylor on Evidence, Vol. I, p. 589; Pollock on Contract, pp. 73, 505 and 537; Trevelyan on Minors, p. 14; *Saral Chand Mitter* v. *Mohun Bibi* (1), *Brohmo Dutt* v. *Dharmodas Ghose* (2), *Dhanmull* v. *Ram Chunder Ghose* (3), *Ram Ratun Singh* v. *Shew Nandan Singh* (4), *Mohori Bibi* v. *Dharmodas Ghose* (5), *Ganesh Lala* v. *Bapu* (6), *Stikeman* v. *Dawson* (7), *Mills* v. *Fox* (8) and *Thurston* v. *Nottingham Permanent Building Society* (9).

The Hon'ble Pandit *Sundar Lal* (with whom Munshi *Jang Bahadur Lal*), for the respondents, first argued the case on the facts and then contended that the defendants had failed to show that there was any fraudulent misrepresentation on the part of

(1) (1898) I. L. R., 25 Calc., 371.
(2) (1898) I. L. R., 26 Calc., 381.
(3) (1890) I. L. R., 24 Calc., 265.
(4) (1901) I. L. R., 29 Calc., 126.
(5) (1903) I. L. R., 30 Calc., 539.
(6) 1895) I. L. R., 21 Bom., 198.
(7) (1847) 1 De Gex and Sm., 90; 16 L. J., Ch., 205
(8) (1888) L. R., 37 Ch. D., 153.
(9) [1902] 1 Ch., 1; [1903] A. C., 6.

1908

JAGAR NATH SINGH
v.
LALTA PRASAD.

the plaintiffs, and that no estoppel could under the circumstances arise. He submitted that, the contract of a minor being void, the practical effect of allowing a plea of estoppel against him would be to validate a void contract. He referred to *Stikeman* v. *Dawson* (1). He next proceeded to comment on the cases cited on behalf of the appellants.

Dr. *Tej Bahadur Sapru* replied.

BANERJI, J.—This and the connected First Appeal No. 118 of 1906 arise out of a suit brought by the respondents Lalta Prasad and Bhuaneshri Prasad for possession of a 2 anna 6 pie share of zamindari and for a declaration that a sale-deed, dated the 28th of June 1899, executed by them jointly with one Dwarka Prasad in respect of the said share, is null and void.

The plaintiffs are the sons of Lala Madho Prasad, whose paternal uncle is the aforesaid Dwarka Prasad. After the death of Madho Prasad in 1882, Dwarka Prasad applied for and obtained in 1888 a certificate of guardianship of the persons and property of the plaintiffs who were minors at the date of their father's death. Madho Prasad and Dwarka Prasad jointly owned an 8 anna share in the village Kharaun, out of which Madho Prasad in his life-time sold 2 annas 9 pies and Dwarka Prasad sold 2 annas 6 pies after Madho Prasad's death. The remaining 2 annas 9 pies was sold by the plaintiffs and Dwarka Prasad on the 28th of June 1899 to Jagar Nath Singh defendant and the predecessors in title of defendants Nos. 2 to 11. The plaintiffs state that they were minors at the date of the sale; that they are persons of weak intellect and inexperienced; that they executed the sale-deed under the influence of Dwarka Prasad, who is an extravagant man of dissolute habits; that they did not derive any benefit from the sale; that the sale was effected without any necessity, and that they did not receive any part of the consideration for it. On these grounds they seek to set aside the sale and recover possession of the portion of the property sold of which the purchasers have taken possession.

The defendants deny that the plaintiffs were minors at the date of the sale and assert that the plaintiffs represented themselves to be of full age and thus induced them to purchase the

(1) (1847) 1 De Gex and Sm., 90; 16 L. J., Ch., 205.

property. They contend that the plaintiffs are estoppel from maintaining the suit, and that in any case they are bound to make restitution of the amount of consideration for the sale. The Court below found that the age of the plaintiffs was below 21 years on the date of the execution of the sale-deed and that they were minors and incompetent to make the contract of sale. Following the ruling of their lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1), the learned Subordinate Judge held the sale to be void. He, however, was of opinion that the plaintiffs had made fraudulent misrepresentations to the purchasers as to their age and that they benefited by the sale. He accordingly made a decree for possession on condition that the plaintiffs should refund so much of the consideration for the sale as represented the value of the share decreed to them.

Against this decree the defendants purchasers have preferred this appeal and the plaintiffs have preferred appeal No. 118. The defendants repeat the pleas advanced by them in the Court below. The plaintiffs contend that they are not liable to make any restitution.

After arguments were heard in both the appeals the learned advocates for the parties informed us that there was some likelihood of a compromise. We accordingly deferred judgment. The parties, however, have not come to any terms and we must decide the appeals.

The first question is that of the age of the two plaintiffs. It was conceded at the hearing that as a guardian of the plaintiffs was appointed by the Court they must be deemed to have been minors until they attained the age of 21. It is alleged on behalf of the plaintiffs that Lalta Prasad was born on the 24th of November 1880 and Bhuaneshri Prasad on the 17th April 1882. If this allegation is true, the former attained majority in 1901 and the latter in 1903. So that both of them were under age when they executed the sale-deed. At the time of the registration of the sale deed, however, the former stated his age to be 24 and the latter 22. As has been stated above, the learned Subordinate Judge has found that both the plaintiffs were under the age of 21 years when they executed the sale-deed. Aft-

(1) (1903) I. L. R., 30 Calc., 539.

1908

JAGAR NATH SINGH v. LALTA PRASAD.

Banerji, J.

carefully considering the evidence I find it impossible to come to a different conclusion. It has been abundantly proved that Madho Prasad, the father of the plaintiffs, died in 1882. The witnesses for the plaintiff, who are men of position and respectability, swear that at that time Bhuaneshri was about six months old and Lalta Prasad about 18 months. There is no reason to disbelieve these witnesses, and it is most unlikely that they have made a mistake. The most important evidence on the point is afforded by the fact that when on the 3rd of April 1888 Dwarka Prasad applied for a certificate of guardianship he stated in his application that the age of Lalta Prasad was 7 and that of Bhuaneshri 6 years. Dwarka Prasad has been examined in this case and has supported his former allegation. He had no motive in 1888 for under-stating the age of each of his grand-nephews, and I see no reason to assume that he did so. According to the evidence of Lieutenant-Colonel Emerson, the Civil Surgeon, the plaintiffs were not of full age in 1899. On this point I fully agree with the finding of the Court below.

As the plaintiffs were minors at the date of the sale-deed they were incompetent to make a contract of sale, and according to the ruling of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1) referred to above, the sale must be held to be absolutely void.

It is contended that as the plaintiffs falsely represented to the appellants that they were of full age and thereby induced the appellants to purchase their property and pay them the price of it, they are estopped from proving their true age and denying the validity of the date made by them. Reliance is placed on the provisions of section 115 of the Evidence Act, which, it is urged, applies to minors also. The authorities on the question whether that section applies to minors are divergent. Whilst it was held by some of the Judges of the Calcutta High Court in *Brohmo Dutt* v. *Dharmodas Ghose* (2) that the section applies only to persons of full age, the contrary view was held by the Bombay High Court in *Ganesh Lala* v. *Bapu* (3). I do not, however, deem it necessary to express any opinion on the point although it seems to me to be difficult to hold that in no case

(1) (1903) I. L. R., 30 Calc., 539. (2) (1898) I. L. R., 26 Calc., 381.
(3) (1895) I. L. R., 21 Bom., 198.

would the doctrine of estoppel be applicable to infants (see Bigelow on Estoppel, pp. 599 *et seqq*). In my opinion the law of estoppel can only be applied subject to other provisions of law, and therefore when, as held by the Privy Council, a contract by a minor is void under the provisions of the Contract Act, the law of estoppel cannot be invoked in aid to validate that which is void under the law. The law on the subject is thus stated in Pollock on Contracts, 6 edn., p. 73:—"When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity which, however, in the case of a contract is not an obligation to perform the contract and must be carefully distinguished from it." Indeed it is not a contractual obligation at all. It is limited to this extent "that the infant is liable to restore any advantage he has obtained by such representation to the person from whom he has obtained it." (p. 52). This was held in *Stikeman* v. *Dawson* (1) and other cases to which it is needless to refer. In that case Vice-Chancellor Knight Bruce observed that for false representation or a fraudulent suppression or concealment the minor was answerable in equity after his majority, notwithstanding his minority at the time. This liability attaches to a minor, not on the ground of estoppel, but, as Sir Frederick Pollock points out, on the ground that "an infant shall not take advantage of his own fraud." If, however, the fact of minority was known and there was no deception, restitution cannot be ordered. No question of estoppel therefore arises in this case, and what we have to consider is whether the plaintiffs made any fraudulent misrepresentation as to their age which deceived the appellants and induced them to purchase the property in question.

The circumstances which led up to the sale of the 28th of June 1899 are these. On the 26th of August 1893 Dwarka Prasad borrowed Rs. 400 from some of the appellants and hypothecated a 4½ pie share. In lieu of that sum and interest due thereon and a further advance of Rs. 665 in cash for the expenses of the marriage of Lalta Prasad, plaintiff, a mortgage bond for Rs. 1,200 was executed by Dwarka Prasad and Lalta Prasad on the 9th of June 1897. On that occasion Lalta Prasad stated

(1) (1847) 16 L. J. Ch., 205.

1908

JAGAR NATH SINGH v. LALTA PRASAD.

Banerji, J.

his age to be 22 years. On the 11th of April 1898 Lalta Prasad alone borrowed Rs. 799-12-0 from Shiubaran Singh and others and executed a mortgage of a 1 anna 3 pie share. On this occasion also he stated his age to be about 22 years. On the 7th of February 1899 Bhuaneshri borrowed Rs. 800 from Babu Karan Singh and executed a mortgage of a 1 anna 3 pie 15 kant share. He stated before the Sub-Registrar that his age was about 22 years and received the money in the presence of that officer. So that long before the execution of the sale-deed in suit the two brothers executed three documents and represented themselves to be persons of full age. In respect of the last two mortgages the appellants brought suits for pre-emption and these suits were defended by the plaintiffs as persons of full age and they filed written statements in that character on the 17th of February 1899. Before that date, that is on the 16th of February 1899, the two plaintiffs and Dwarka Prasad sent a notice to the appellants informing them that they were desirous of selling a 3 anna share in the village Kharaun and that the price had been settled with Shiubaran Singh and others at Rs 8,000, and they asked the appellants if they would purchase that share for the aforesaid price. They further stated in the notice that the sale should be completed within ten days, otherwise the property would be sold to Shiubaran Singh and others. An answer to this notice was sent on the 23rd of February 1899 expressing readiness to purchase for a reasonable price. After this the pre-emption suits were compromised and petitions of compromise were filed on 15th March 1899, in which Lalta Prasad and Bhuaneshri said that it had been agreed with the present appellants, the plaintiffs in those suits, that each of the two brothers would sell to the appellants a 1 anna 3 pie 15 kant share for a consideration of Rs. 2,800. In the written statements, the notice and the petitions of compromise mentioned above, the plaintiffs professed to act as persons of full age. Decrees were passed in the pre-emption suits against the plaintiffs in accordance with the compromise, and in the decrees their names appear as those of persons of full age. It was in pursuance of the terms of the compromise that the sale-deed of 28th June 1899 was executed. The property sold was a

1908

JAGAR NATH SINGH
v.
LALTA PRASAD.

Banerji, J.

2 anna 9 pie share, and the consideration was Rs. 5,058-5-0, which was made up of Rs. 1,674-8-0 due to Shiubaran Singh and others on the mortgages of 11th April 1898, and the 6th of January 1899; Rs. 1,420-8-0 due on account of the mortgage of 9th June 1897, and Rs. 2,863-5-0 paid in cash before the Sub-Registrar. At the time of registration of this document Lalta Prasad stated his age to be about 21 and Bhuaneshri's about 22 years. It is thus manifest that not only at the date of the execution of the sale-deed in question did the plaintiffs represent themselves to be of full age, but in 1897, 1898 and 1899 they executed documents in favour of the appellants and other persons in which they made similar representations, and at no time was it ever hinted that they were minors. As in fact they were minors, these representations were falsely made and they were clearly made with a view to induce the appellants to advance them money and purchase their property on the faith of these representations. If the appellants or any of them was aware of their true age they had no object in obtaining documents from them without the intervention of a guardian. I fully agree with the following observations of the learned Subordinate Judge:—"There is no satisfactory evidence on the record to show that the defendants knew the true age of the plaintiffs and were not misled by their untrue statements. The defendants are residents of Ghazipur, while the plaintiffs are residents of Jaunpur. There is no reason to believe that the defendants knowingly entered into a contract with minors. Had they known the plaintiffs to be minors they would not have entered into the *sulehnamas* in the pre-emption suits nor into this sale transaction. The facts are all against the supposition that the defendants knew the plaintiffs to be minors." It is true Sita Ram appellant stated that he had known Bhuaneshri for thirteen years, but Sita Ram was not one of the purchasers under the sale-deed, and it does not appear that any of the purchasers had ever seen the plaintiffs before they entered into the transactions of 1897 and 1898. The Sub-Registrar who registered the deeds mentioned above has given evidence in this case and has stated that he considered the plaintiffs to be men of full age, and it is not surprising that the appellants also considered them to be of full age and were as

1903

JAGAR NATH SINGH v. LALTA PRASAD.

Banerji, J.

much deceived on the point as the Sub-Registrar. In my judgment the plaintiffs made false representations as to their age with a view to induce the purchasers at first to lend them money and afterwards to purchase their property and that these representations were fraudulently made. The plaintiffs are therefore liable in equity to make restitution for the benefit they obtained.

The learned Subordinate Judge has ordered the plaintiffs to refund Rs. 5,416-10-5 out of the consideration for the sale. He is of opinion that the whole of this money was received by the plaintiffs and this finding is, in my opinion, justified by the evidence. The endorsement of the Sub-Registrar on the sale-deed shows that Rs. 2,863-5-0 was received by Lalta Prasad in his presence. Lalta Prasad has not repudiated the correctness of this entry, and he has not by his own deposition or by any other evidence proved that he returned the money or gave it to Dwarka Prasad. He borrowed Rs. 793-12-0 from Shiubaran Singh and others, and Bhuaneshri borrowed Rs. 800 from them. These amounts, together with interest, were due by them, and the total sum due was Rs. 1,674-8-0. It has been proved that this sum was paid by the appellants to the creditors Shiubaran Singh and others. Of the amount of the bond of 9th June 1897 Lalta Prasad took Rs. 665 for the expenses of his marriage. This amount together with interest was clearly due by him alone, and as it was set off against the consideration for the sale deed he has benefited to the extent of the amount due by him. It has thus been abundantly proved that the two plaintiffs, who are admittedly joint, received and benefited by the amount which the Court below has directed to be restored by them. As pointed out by that Court, although they were minors in the eye of the law, they were grown-up young men when they received the money. Lalta Prasad was on his own showing about 19 years old and Bhuaneshri over 17. They were old enough to understand and know their own interests, and it is most unlikely that they were entirely under the influence of Dwarka Prasad. They are therefore liable to make restitution of the amounts by which they have benefited. In the case of *Mohori Bibee* v. *Dharmodas Ghose* (1) restitution was not ordered, but that was apparently

(1) (1903) I. L. R., 30 Calc., 539.

on the ground that the mortgagee in that case had advanced the money with full knowledge of the age of the plaintiff and was not deceived. In the present case I am of opinion that the purchasers were ignorant of the true age of the plaintiffs and were deceived by their misrepresentations. I would therefore dismiss both the appeals with cost.

RICHARDS, J.—These appeals arise out of a suit for a declaration of the plaintiffs' title to certain property and for a declaration that a certain sale-deed dated the 28th of June 1899 was void as against the plaintiffs. The plaintiffs are the sons of one Lala Madho Prasad. Lala Madho Prasad was the son of Lala Mahabir Prasad. Lala Mahabir Prasad was a brother of the defendant Lala Dwarka Prasad. These persons were all members of a joint Hindu family and the property in question was part of the joint family estate. Mahabir Prasad died in 1870, leaving Madho Prasad, his son, a minor, him surviving. The share of the family was an eight anna zamindari share. After the death of Mahabir Prasad, Dwarka and Madho sold a 2⅝ share out of the eight anna share. Madho died on the 25th September 1882 leaving the plaintiffs infant children him surviving. In 1891, Dwarka Prasad sold a 2 anna 3 pie share and also a 2 anna 7½ pie share to certain persons now represented by the defendants 1 to 11.

The plaintiffs did not join in this sale.

On the 28th of June 1899, Dwarka Prasad and the plaintiffs sold a 3 pie share to one Beni Koon and others, and the remaining 2 anna 9 pie share to persons represented by the defendants 1 to 11.

It is in effect to set aside the deed transferring this 2 anna 9 pie share that the present suit is brought. The plaintiffs allege that the plaintiff No. 1, Lalta Prasad, was born on the 24th of November 1880, and that the plaintiff No. 2, Lala Bhuaneshri Prasad, was born on the 17th April 1882, and that they attained majority on the 24th of November 1901 and the 17th of April 1903, respectively; that they received no consideration, and that the sale was a fraud upon them. The defendants 1 to 11 allege that the plaintiffs were of full age when they executed the sale-deed, and that even if they were not, they represented themselves

1908

JAGAR NATH SINGH v. LALTA PRASAD.

Richards, J.

as being of full age, and that therefore they ought not to be allowed to set up the minority.

A certificate of guardianship of the person and property of the plaintiffs was granted in the year 1888 to Dwarka Prasad, and accordingly, under the provisions of Act No. XL of 1858, the plaintiffs did not attain majority until they reached the age of 21 years respectively. The Court below has found that the plaintiffs were minors at the time the sale-deed of the 28th June 1899 was executed. The learned Subordinate Judge says—"The fact of the plaintiffs being minors is established beyond any reasonable doubt." I entirely agree with that finding. Dwarka Prasad, the guardian of the minors, was examined and proved that they were minors. Perhaps not much reliance should be placed on his uncorroborated evidence, but on the 10th of March, 1888, he made an application to the District Judge to be appointed guardian of the minors (he was subsequently appointed guardian). He then gave the ages of the plaintiffs as seven years and six years, respectively. In the year 1888 Dwarka had no object or motive for under-stating the ages of his nephews, and it is impossible not to give great weight to this corroboration of his evidence. The Civil Surgeon examined the plaintiffs on the 25th of November 1905, and he stated the age of the elder plaintiff to be then twenty-four years and the younger plaintiff twenty-two years. This was six years after the execution of the deed in question, and unless the Civil Surgeon was very much in error, the plaintiffs must have been under twenty-one years in June, 1899. There was a lot of other evidence which is not perhaps very definite, but the age of the plaintiffs, particularly of the plaintiff Bhuaneshri Prasad is fixed by the death of their father Madho Prasad, which unquestionably happened not earlier than 1882. Bhuaneshri Prasad was then an infant in arms. In 1899 the plaintiffs were recorded as minors. On the last day of the hearing of the appeal the last-mentioned plaintiff was in Court and he appears even now to be a very young man. I think it is pretty clear from the evidence that Dwarka was at least an extravagant man. He very soon dissipated almost his entire interest in the family property. It was quite unnecessary for him to have applied for a certificate of guardianship to his nephews, as the family

was joint, and I have no doubt that his object in getting himself appointed was to enable him the more effectually to dispose of the minors' property. I also think that there is a good deal in the case to suggest that the interests of the plaintiffs were not very well looked after. The defendants or the persons whom they represent had become co-sharers in 1891, and I think it hard to believe that they were unaware of the plaintiffs' real age. In fact one of the defendants, Sita Ram, admits that he had seen the second plaintiff visiting the village "for the last 12 or 13 years." I shall now proceed to consider the evidence as to the alleged representation by the plaintiffs that they were of full age. The plaintiffs went before the Registrar in 1897, 1898 and in 1899 in connection with the registration of certain mortgages. It is not very clear what occurred before the Registrar, but they apparently did give their ages as being over 21 years. Possibly the Registrar was deceived, but the Registrar was not the purchaser. They also defended a suit or suits as adults. There is, however, no evidence that in the negotiations for the sale of the 28th of June 1899, or at any time up to the execution of the deed the plaintiffs ever represented themselves to the defendants (or to the persons now represented by the defendants) as being of full age. None of the defendants have come forward to say that they were in fact misled by the representation of the plaintiff, or that they ever made any inquiry about their ages. The defendant Sita Ram says that the sale-deed sued on was executed under his superintendence, and in cross-examination he admitted that he had been seeing Bhuaneshri Prasad for 12 or 13 years. I am quite satisfied that Sita Ram knew that plaintiff No. 2 at least was under 21 years. I believe the truth to be that the defendants, who had already acquired the greater part of Dwarka's share, were naturally very anxious to acquire the remaining shares and were prepared to take the risk of purchasing from minors. I think it quite impossible to hold that the plaintiffs were guilty of fraudulent misrepresentation of their ages committed for the purpose of deceiving the defendants or their representatives and inducing them to buy the property. The learned Subordinate Judge did not frame any express issue as to whether or not there had been fraudulent misrepresentation by the plaintiffs as to their

1908

JAGAR NATH SINGH v. LALTA PRASAD.

Richards, J.

ages. At pages 20 and 21 of the judgment, however, he refers to two pre-emption suits brought by the defendants against the plaintiffs and their uncle Dwarka. These suits were defended by the plaintiffs as adults, and the learned Judge says that the plaintiffs ought to have brought to the notice of the Court that they were minors, and later on, at page 21, he says.— "If *ever a fraud* was committed upon a Court deliberately and with the object of injuring the other party this is such a case." On the strength of this supposed fraud, the learned Judge has ordered the plaintiffs to refund the sale consideration as a condition precedent to setting aside the sale deed. Surely this is a strange ground for holding minors guilty of fraud. I think the evidence goes to show that the whole litigation was managed by Dwarka, and that the plaintiffs were under his influence and ready to do whatever he told them to do, and I think it quite impossible to hold that the plaintiffs were guilty of fraudulent misrepresentation merely because when sued as adults they neglected to inform the Court of their minority. In my opinion the ordinary law as to estoppel does not apply to infants and this was practically admitted in the argument. It is said, however, that an infant is liable for fraudulent misrepresentation in an action for deceit and that the fraud of an infant may therefore be set up as a defence when the infant seeks to set aside a transaction induced by his fraud. Assuming this for the purpose of argument to be so, I think it a fair test in this case to consider whether the defendants on the evidence could succeed if they were suing as plaintiffs in a suit for damages for fraudulent misrepresentation I certainly hold they could not. In such a suit the plaintiffs should prove that they were induced to enter into the contract of sale by the fraudulent misrepresentation of the defendant and that the plaintiff (purchaser) was in fact deceived and really did not know the true state of the facts. They (the defendants) have never come forward to say that they were in fact misled or deceived. The evidence is altogether consistent with the plaintiffs acting under the influence of their uncle, and the defendants' agent, Sita Ram, I believe, knew well that the plaintiffs were minors. One question further remains, namely, should the Court direct the plaintiffs to make any compensation to the defendants, and if so, to what extent? The Court

below directed that Rs 5,416-10-5 should be paid by the plaintiffs before getting possession. It seems to me that the policy of the law is to protect infants against themselves as well as against others. In the case of *Mohori Bibee* v. *Dharmodas Ghose* (1) their Lordships of the Privy Council held that a minor was wholly incapable of making contracts. Section 64 of the Contract Act therefore does not apply. In the case cited the minor was within a few months of being 21 years when he executed the mortgage, and yet the latter was set aside without any compensation. Dealing with the question of compensation their Lordships quote the following passage from the judgment of Lord Justice Romer in the case of *Thurston* v. *Nottingham Permanent Building Society* (2):—"The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which as against that person the Legislature has declared to be void." In the case of *Thurston* v. *Nottingham Permanent Building Society,* the infant was allowed to keep the entire advance made to her by the Society for the purpose of completing buildings on her property. I can see no reason for directing the plaintiffs to refund the entire purchase money. Furthermore the cases of both the plaintiffs are not quite identical. Lalta Prasad was not only the elder of the two, but he seems to have received a larger amount of money. Lalta Prasad as sole mortgagor mortgaged a 1 anna, 3 pie share on the 11th of April 1898. Bhuaneshri Prasad in like manner, on the 7th of January 1899, mortgaged a 1 anna, 3 pie, 15 kant share. The defendants or their representatives brought suits for pre-emption against Lalta and Bhuaneshri in respect of these mortgages. (These are the suits the plaintiffs defended as adults.) The suits were compromised and decrees made in the terms of the compromise. By these compromises the defendants in the present suit were to pay Rs. 829 with interest to the mortgagees in respect of Lalta's mortgage and Rs. 52-8-0 costs. They were also to pay Rs. 811 with interest and Rs. 52-8-0 costs in respect of Bhuaneshri Prasad's mortgage. In the sale-deed of the 11th of April 1899, it is recited that Rs. 1,674-8-0 was paid to the mortgagees on foot of these mortgages. The shares of the plaintiffs

(1) (1903) I. L. R., 30 Calc., 539. (2) [1902] 1 Ch., 1: [1903] A. C., 6.

1908

JAGAR NATH SINGH v. LALTA PRASAD.

Richards, J.

in respect of this sum of Rs. 1,674-8-0 were practically equal in amount and I treat them as equal. Lalta had had a further advance of Rs. 665 on foot of the mortgage made by him and his uncle on 9th June 1897, and under the terms of the sale-deed, this mortgage was also paid off. It may therefore be said that on the sale of the 28th of June 1899, debts of Lalta's to third parties were discharged as follows. Rs. 665, Rs. 837-4-0 (half of Rs. 1,674-8-0) and Rs. 52-8-0 costs, total Rs. 1,554-12-0. In the case of Bhuaneshri, debts were in like manner discharged: Rs. 837-4-0 (half of Rs. 1,674-8-0) and Rs. 52-8-0 costs, total Rs. 889-12-0. Lalta was married in 1897 and the Rs. 665 were paid for his marriage expenses. I think that it would be reasonable under the provisions of section 41 of the Specific Relief Act to direct that plaintiff Lalta should pay to the defendants the sum of Rs. 1,554-12-0 as a condition to getting possession, and that the plaintiff Bhuaneshri should in like manner pay the sum of Rs. 889-12 0, and I would to this extent modify the decree of the lower Court. These sums represent mortgage debts paid to third parties. The mortgages have never been set aside, and I think that these mortgage debts stand on a different basis from the other moneys which the Court below has directed the plaintiffs to pay as a condition precedent to getting possession. I would dismiss the defendants' appeal, and allow the appeal of the plaintiffs to the extent mentioned above.

Appeal dismissed.

REVISIONAL CRIMINAL.

1908
November 12.

Before Mr. Justice Richards and Mr Justice Karamat Husain.

EMPEROR v. DUNGAR SINGH*

Act No. II of 1899 (Indian Stamp Act), schedule I, article 53 (c)—Stamp—Receipt for rent—Receipt for money paid out of Court in satisfaction of a decree for rent.

Held that, although a receipt for rent of an agricultural holding is exempt from payment of stamp duty under article 53 (c) of the first schedule to the Indian Stamp Act, 1899, a receipt for payment out of Court of money due under a decree for such rent is not so exempt.

*Criminal Revision No. 654 of 1908 from an order of B. J. Dallal, Sessions Judge of Agra, dated the 14th of August 1908.

One Dungar Singh, as agent for a zamindar, obtained a decree for rent against a tenant. On account of that decree the judgment-debtor paid certain moneys to Dungar Singh, who granted a receipt therefor, but omitted to stamp it. For this Dungar Singh was tried by a magistrate of the first class for an offence under section 62 of the Indian Stamp Act, 1899; was convicted, and was sentenced to a fine of Rs. 40 or in default to forty days' simple imprisonment. Against his conviction and sentence Dungar Singh applied in revision to the Sessions Judge of Agra, who being of opinion that article 53 (c) of the first schedule to the Stamp Act applied, and that no stamp was required for such a receipt, submitted the case to the High Court under the provisions of section 438 of the Code of Criminal Procedure with the recommendation that the conviction and sentence should be set aside.

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown.

Richards and Karamat Husain, JJ.—Dungar Singh was convicted under section 62, of the Indian Stamp Act (II of 1899) and sentenced to a fine of Rs. 40 or to suffer simple imprisonment for 40 days. It appears that the accused held a decree for rent against a certain tenant and gave a receipt for the amount of the decree to the tenant without any stamp denoting payment of duty. The accused Dungar Singh was himself merely an agent of a zamindar. Generally speaking, receipts must be stamped, but an exemption is made by article 53 (c), schedule I, of the Stamp Act in favour of receipts for payment of rent by cultivators on account of land assessed to Government revenue. The learned Sessions Judge has referred the matter to this Court under section 438, Criminal Procedure Code, suggesting that the conviction is wrong and should be set aside, inasmuch as a receipt for money paid under a decree for rent must be treated as a receipt for rent. A learned Judge of this Court considering the matter of general importance has referred the case to a Bench of two Judges. In our judgment the conviction was correct. The debt of rent merged in the decree, and it is admitted that a receipt for money payable under a decree must bear a stamp. We do not think that there was any intention to defraud the revenue. Absence of such intention though not sufficient to make a

1908

EMPEROR v. DUNGAR SINGH.

conviction bad, may be taken into consideration in awarding punishment. We alter the sentence from a fine of Rs. 40 to a fine of Rs. 5, or in default imprisonment for 40 days. If the fine has already been paid Rs. 35 will be refunded. Let the record be returned.

1903
November 20.

REVISIONAL CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

MAZHAR HASAN (APPLICANT) v. SAID HASAN (OPPOSITE PARTY.)*

Civil Procedure Code, section 622—Criminal Procedure Code, sections 195, 439 —Act No. XVIII of 1879 (Legal Practitioners Act), section 14—Jurisdiction.

A complaint made by letter by a litigant to the Subordinate Judge charging a pleader with professional misconduct was "filed" by the Subordinate Judge; but on a similar complaint being sent to the District Judge, the District Judge, having inquired into its authenticity, sent it to the Subordinate Judge for inquiry and report. The Subordinate Judge thereupon instituted an inquiry under section 14 of the Legal Practitioners Act, as a result of which he granted sanction to the pleader to prosecute for perjury one of the witnesses who had appeared before him in the course of the inquiry, and this order was confirmed by the District Judge.

Held that the High Court had no jurisdiction to interfere with the order of the Subordinate Judge under either section 195 or section 439 of the Code of Criminal Procedure; nor could it interfere under section 622 of the Code of Civil Procedure, inasmuch as the Subordinate Judge, though he possibly mistook the meaning of the District Judge's order addressed to him, had jurisdiction to inquire into the truth of the charge made against the pleader.

THIS was a case arising out of a suit brought by a Muhammadan lady to recover her dower. The plaintiff obtained a decree from the Court of the Subordinate Judge of Moradabad, but in the course of execution proceedings a compromise was filed by the plaintiff's vakil. After this the plaintiff sent letters to the Subordinate Judge, the District Judge and the High Court, complaining that the compromise had been filed contrary to her interests and in collusion with the other side. Neither the Subordinate Judge nor the District Judge took any notice of these communications, but the High Court sent the letter which it had received to the District Judge. The District Judge having ascertained that it was really the letter of the plaintiff sent it on to the

* Civil Revision No. 21 of 1903, from an order of W. F. Kirton, District Judge of Moradabad, dated the 14th April 1903.

Subordinate Judge for inquiry. The Subordinate Judge, possibly misunderstanding the wording of the District Judge's order, proceeded to hold an inquiry into the conduct of the vakil concerned under the provisions of the Legal Practitioners Act, 1879. In the course of this inquiry one Mazhar Hasan the plaintiff's agent appeared as a witness and stated on oath that he had never instructed the vakil to file the compromise. On the application by the vakil the Subordinate Judge subsequently granted sanction for the prosecution of Mazhar Hasan. Mazhar Hasan thereupon filed three applications in the High Court. The present was an application in revision on the Civil side. The other two were applications under section 195 and section 439 of the Code of Criminal Procedure respectively. All three applications are dealt with by the judgment printed below.

Mr. *G. P. Boys*, for the applicant.

Mr *B. E. O'Conor*, for the opposite party.

RICHARDS and GRIFFIN, JJ.—This application is connected with Criminal Revisions Nos. 220 and 221 of 1908.

The facts are shortly as follows :—

Certain civil proceedings were proceeding in the Court of the Subordinate Judge. The suit was one by a Muhammadan lady for dower. In the course of the execution of a decree in that suit a compromise was filed on behalf of the lady by her vakil. The lady sent a complaint to the High Court, District Judge and the Subordinate Judge, alleging that the compromise had been filed contrary to her interest by her vakil in collusion with the other side. The Subordinate Judge apparently did not consider it necessary to take any steps as the result of the lady's communication. Her letter was unverified, and apparently not produced by a person duly authorized to produce it. The High Court sent the communication it received to the District Judge. The District Judge had the communication verified and sent it on to the Subordinate Judge for inquiry. It is quite possible that the District Judge did not intend that the Subordinate Judge should go the length of holding an inquiry under the Legal Practitioners Act as the result of his direction. The Subordinate Judge, however, did hold an inquiry under the Legal Practitioners Act. In the course of this inquiry the applicant was

1908

MAZHAR HASAN v. SAID HASAN.

examined as a witness, and he is alleged to have stated, amongst other things, that he never instructed the pleader to file the compromise. The Subordinate Judge on the application of the pleader granted leave to prosecute Mazhar Hasan the present applicant. There was an appeal to the District Judge, who refused to interfere with the order of the Subordinate Judge. The present applications are made to this Court. Criminal Revision No. 220 is brought under section 195 of the Code of Criminal Procedure. In our judgment an application under section 195 does not lie to this Court under the circumstances of the present case. The Subordinate Judge sanctioned the prosecution and the District Judge merely confirmed the order of the Subordinate Judge. The case is in our opinion governed by the case of *Salig Ram* v. *Ramji Lal* (1). As to Criminal Revision No 221 it is brought under the provisions of section 439 of the Code of Criminal Procedure. It is quite clear under the authority of the last mentioned case that this Court cannot entertain the application under the provisions of section 439. This application is made under the provisions of section 622 of the Code of Civil Procedure, and accordingly it is necessary for the applicant to show that the orders of the Subordinate Judge and of the District Judge were made without jurisdiction. The learned counsel for the applicant contends that before an inquiry could be held under the Legal Practitioners Act, it was necessary that a pleader should "be charged in his Court" with some offence mentioned in section 14 of the Act, and he contends that the only charge in the Subordinate Judge's Court was the letter of the lady to him, and that the Subordinate Judge himself "shelved," that is to say, refused to hold any inquiry on that charge. We cannot agree with this contention. The Subordinate Judge had before him first the lady's complaint. Subsequently he got from the District Judge a repetition of that complaint duly verified, and he then proceeded to hold the inquiry. We do not think that the shelving of the first letter was a refusal to entertain the charge, and we think that the first letter followed by the communication from the District Judge amounted to a "charging of the pleader in the Court of the

(1) (1906) I. L. R., 24 All., 554.

1908

MAZHAR HASAN v. SAID HASAN.

Subordinate Judge" within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure, and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

Application dismissed.

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Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... ... 2 *a*. 6 *p*. (1 *a*.)

Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ... 11 *a*. (2 *a*)

Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ... 9 *a*. (2 *a*.)

Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ... 6 *a*. (1 *a*.)

Act XII of 1884 (Agriculturists, Loans), as modified up to 1st February, 1903 ... ... 2*a*. (1 *a*)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... ... 7 *a*. (1 *a*)

Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905 ... 5 *a*. (1 *a*)

Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ... ... 8 *a*. (1 *a*. 6 *p*)

Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ... ... 6 *a*. (1 *a*.)

Act XI of 1886 (Tramways), as modified up to 1st December, 1903 ... 9 *a*. (2 *a*.)

Act XIII of 1886 (Securities), as amended by Act XII of 1891 ... ... 2 *a*. 9 *p*. (1 *a*.)

Act VII of 1887 (Suits Valuation), as modified up to 1st October, 1904 ... 1 *a*. 9 *p*. (1 *a*)

Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... ... 6 *a.* (1 *a.*)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... 8 *a.* (1 *a.*)
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ... ... 9 *a.* (2 *a.*)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 *a.* 9 *p.* (1 *a.*)
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... ... 5 *a.* 6 *p.* (1 *a.*)
Act X of 1889 (Ports), as modified up to 1st April, 1901 ... ... 11 *a.* (2 *a.*)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ... 7 *a.* (1 *a.*)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... 3 *a.* (1 *a.*)
Act IX of 1890 (Railways), as modified up to 1st June, 1905, with an Index ... ... Re. 1-2. (2 *a.*)
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ... ... 2 *a.* 3 *p.* (1 *a.*)
Act XII of 1891 (Repealing and Amending Act), shewing the schedules as modified up to 31st May, 1902 ... ... 12 *a.* (1 *a.* 6 *p.*)
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... ... 1 *a* 3 *p.* (1 *a.*)
Act I of 1894 (Land Acquisition), with footnotes ... ... 7 *a.* (1 *a*)
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ... ... 9 *a* (2 *a.*)
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... 7 *a.* 6 *p.* (1 *a.* 6 *p.*)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... 1 *a* 6 *p.* (1 *a.*)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1903 ... ... Rs. 3-10. (8 *a.*)
Act VIII of 1899 (Petroleum), as modified up to 1st December, 1904 ... 7 *a* (1 *a.*)
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... ... 1 *a.* (1 *a.*)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ... ... 6 *a.* 6 *p.* (1 *a.*)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... 5 *a* 6 *p.* (1 *a*)
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... 6 *a.* 6 *p.* (1 *a.*)
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... 1 *a.* 9 *p.* (1 *a*)
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... 5 *a.* 6 *p.* (1 *a*)
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 ... ... 13 *a.* (2 *a.*)
Regulation VI of 1886 (Ajmer Rural Boards) as modified up to 1st February, 1897 ... ... 5 *a.* 6 *p.* (1 *a.*)
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891 ... ... 5 *a.* (1 *a*)
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... 4 *a.* 9 *p.* (1 *a.*)
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 ... ... 6 *a.* (1 *a.*)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1903.
Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1903. 8vo. Stitched.
[The above may be obtained separately. The price is noted on each].

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1893, with foot-notes brought down to 1st December, 1901... In Urdu. 2 *a.* 6 *p.* (1 *a.*)
Act XX of 1847 (Copyright), as modified up to 1st May, 1898 ... ... In Urdu. 1 *a.* 3 *p.* (1 *a.*)

Act	Price
Act XX of 1847 Copyright as modified up to 1st May, 1896 ...	... In Nagri. 1. *a*. 3 *p*. (1 *a*.
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	... In Urdu. 6 *p* (1. *a*)
Ditto ditto ...	... In Nagri. 6 *p*. (1 *a*.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	... In Urdu. 6 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 6 *p* (1 *a*.)
Act XXX of 1852 (Naturalisation), as modified up to 1st December, 1902	... In Urdu 6 *p*. (1 *a*)
Ditto ditto	... In Nagri. 6 *p*. (1 *a*.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	... In Urdu. 3 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 3 *p*. (1 *a*.)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	... In Urdu. 6 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 6 *p*. (1 *a*)
Act XX of 1856, as modified up to 1st November, 1903 ...	... In Urdu. 2 *a* 6 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 2 *a* 6 *p*. (1 *a*.)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	... In Urdu. 1 *a* (1 *a*)
Ditto ditto	... In Nagri. 1 *a*. (1. *a*)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	.. In Urdu. 1 *a* (1. *a*.)
Ditto ditto	... In Nagri. 1. *a* (1 *a*.)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 ..	In Urdu. 1 *a*. 6 *p* (1 *a*.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	... In Urdu. 3 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 3 *p*. (1 *a*.)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	... In Urdu. 3 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 3 *p*. (1 *a*.)
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	... In Urdu. Re. 1-5 (5 *a*.)
Ditto ditto	... In Nagri. Re. 1-5 (5 *a*.)
Act V of 1861 (Police), as modified up to 7th March, 1903 ...	... In Urdu. 2 *a*. 9 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 2 *a* 9 *p*. (1 *a*.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	... In Urdu. 1 *a*. 3 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 1 *a*. 3 *p*. (1. *a*.
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	... In Urdu. 1 *a*. (1 *a*)
Ditto ditto	... In Nagri. 1 *a* (1 *a*.)
Act VI of 1864 (Whipping), as modified up to 1st April, 1900	... In Urdu. 1 *a*. 6 *p*. (1 *a*.)
Ditto *ditto*	... *In Nagri* 1 *a*. 6 *p*. (1 *a*.)
Act III of 1865 (Carriers) as modified up to 31st May, 1903	... In Urdu. 9 *p*. (1 *a*).
Ditto ditto	... In Nagri. 9 *p*. (1 *a*)
Act III of 1867 (Gambling), as modified to 1st December, 1896	... In Nagri. 2 *a*. (1 *a*.)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895	... In English, Urdu, and Nagri. Bound. Rs. 3 (5 *a*.)
Ditto ditto	... Unbound. Rs. 2-8. (5 *a*)
Act VII of 1870 (Court-fees), as modified up to 1st December, 1896	... In Urdu. 5 *a*. 3 *p*. (2 *a*. 6 *p*.)
Ditto as modified up to 1st October, 1899	... In Nagri. 8 *a* 9 *p*. (1 *a*.)
Act I of 1871 (Cattle trespass) as modified up to 1st December, 1903	... In Urdu. 1 *a*. 9 *p*. (1 *a*.)
Ditto ditto	... In Nagri. 1 *a*. 9 *p*. (1 *a*.)
Act XXIII of 1871 (Pensions)	... In Urdu. 9 *p*. (1 *a*.)
Ditto	... In Hindi. 9 *p*. (1 *a*.)
Act I of 1872 (Evidence), as modified up to 1st May, 1903 ...	... In Urdu. 8 *a* (2 *a*)
Ditto ditto ...	... In Nagri. 8 *a*. (2 *a*)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	... In Urdu. 2 *a*. 6 *p*. (1 *a*.)
Act IX of 1872 (Contract), as modified up to 1st September, 1899	... In Urdu. 9 *a*. 9 *p*..

Act IX of 1872 (Contract), as modified up to 1st September, 1899 ... In Nagri. 9 a. 6 p. (3 a.

Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ... In Urdu. 4 a. (2 a.)

Ditto ditto ... In Nagri. 4 a. (2 a.)

Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 In Urdu. 9 p. (1 a.)

Ditto ditto ... In Nagri. 9 p. (1 a.)

Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899 ... ... In Urdu. 3 a. 3 p. (1 a.)

Ditto ditto ... In Nagri. 3 a. 3 p. (1 a.

Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... ... In Urdu. 9 p. (1 a.)

Ditto ditto ... In Nagri. 1 a. (1 a.)

Act IX of 1875 (Majority), as modified up to 1st May, 1906 ... ... In Urdu. 3 p. (1 a.)

Ditto ditto ... In Nagri. 3 p. (1 a.)

Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... In Urdu. 4 a. 6 p. (1 a. 6 p.)

Ditto ditto ... In Nagri. 4 a. 3 p. (1 a. 6 p.)

Act III 1877 (Registration), as modified up to 1st December, 1896 ... In Urdu. 4 a. 3 p. (2 a.

Ditto ditto ... In Nagri. 4 a. 6 p. (2 a.

Act I of 1878 (Opium), as modified up to 1st December, 1896 ... In Nagri. 1 a. 6 p. (1 a.

Act VII of 1878 (Forests), as modified up to 1st December 1903 ... In Urdu. 4 a. (1 a. 6 p.

Ditto ditto ... In Nagri 3 a. 9 p. (1 a. 6

Act XI of 1878 (Arms), as modified up to 1st May, 1901 ... In Urdu. (2 a. (1 a.)

Ditto ditto ... ... In Nagri. 2 a. (1 a.)

Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902 In Urdu. 2 a. (1 a.)

Ditto ditto ... In Nagri. 2 a. (1 a.)

Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 In Urdu. 2 a. 6 p. (1 a.

Ditto ditto ... In Nagri. 2 a. 6 p. (1 a.

Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... In Urdu. 1 a. 6 p. (1 a.

Ditto ditto ... In Nagri. 1 a. 6 p. (1 a.

Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898 ... ... In Urdu. 9 a. (1 a. 6 p.

Ditto ditto ... In Nagri. 9 a. (1 a. 6 p.

Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ... In Urdu. 6 a. 9 p. (2 a.)

Ditto Ditto ... In Nagri. 6 a. 9 p. (2 a.

Act VI of 1882 (Companies), as modified up to 1st August, 1906 ... In Urdu. 13 a. 9 p. (3 a.)

Ditto ditto ... In Nagri. 14 a. (3 a.)

Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December 1899 ... ... In Urdu. Re. 1-4. (6 a.)

Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... ... In Urdu. 1 a. (1 a.)

Ditto ditto ... In Nagri. 1 a. (1 a.)

Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ... In Urdu. 4 a. 9 p. (1 a. 6

Ditto ditto ... In Nagri. 4 a. 6 p. (1 a. 6

Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ... In Urdu. 1 a. 3 p. (1 a.)

Ditto ditto ... In Nagri. 1 a. 3 p. (1 a.)

Act VI of 1884 (Inland Steam Vessels), as modified up to 1st July, 1891 ... In Urdu. 3 a. 6 p. (1 a. 6

Ditto ditto ... In Nagri. 3 a. 6 p. (1 a. 6

Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1906 In Urdu 6 p. (1 a.)

Ditto ditto ... In Nagri. 6 p. (1 a.)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... In Urdu 2 a. 6 p. (1 a.)

Act II of 1885 (Negotiable Instruments Amendment). ... In Urdu. 9 p. (1 a.)

Act III of 1885 (Transfer of Property Amendment) ... ... In Urdu. 3 p. (1 a.)

Act X of 1885 (Oudh Estates Amendment) ... ... In Urdu. 3 p. (1 a.)

Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ... In Urdu. 1 a. 6 p. (1 a.)

Act XXI of 1885 (Madras Civil Courts Amendment) ... ... In Urdu. 3 p. (1 a.)

Act	Script	Price
Act II of 1886 (Income tax), as modified up to 1st April, 1903	In Urdu.	3 a. (1 a. 9 p.)
Ditto ditto	In Nagri.	3 a. (3 a. 9 p.)
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu.	3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu.	1 a. 3 p. (1 a.)
Act VII of 1886 (Registration Amendments)	In Urdu.	3 p. (1 a)
Act X of 1886 (Criminal Law Amendment)	In Urdu.	9 p. (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900	In Urdu.	3 a. 3 p. (1 a.)
Ditto ditto	In Nagri.	3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu.	9 p. (1 a.)
Ditto ditto	In Nagri.	9 p. (1 a)
Act VI of 1887 (Companies Amendment)	In Urdu.	3 p. (1 a.)
Act VII of 1887 (Suits' Valuation)	In Urdu.	9 p. (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu.	2 a. 3 p. (1 a.)
Ditto ditto	In Nagri.	2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships)	In Urdu.	1 a. 6. p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	In Urdu.	1 a. 3 p. (1 a.)
Ditto ditto	In Nagri.	1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	In Urdu.	3 a. 6 p. (1 a.)
Ditto ditto	In Nagri	3 a. 6 p. (1 a)
Act XV of 1887 (Burma Military Police),	In Urdu.	9 p. (1 a)
Ditto ditto	In Nagri.	9 p. (1 a)
Act XVIII of 1887 (Allahabad University)	In Urdu.	1 a. (1 a.)
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu	6 p. (1 a)
Ditto (as passed)	In Nagri.	6 p (1 a.)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu.	3 p (1 a)
Ditto (as passed)	In Nagri.	3 p. (1. a.)
Act V of 1888 (Inventions and Designs)	In Urdu.	2 a. 3 p. (1 a)
Act VI of 1888 (Debtors)	In Urdu.	6 p (1 a)
Ditto	In Nagri.	6 p (1 a.)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu.	1 a. 9 p. (1 a)
Ditto	In Nagri.	1 a. 9 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu.	6 p. (1 a)
Ditto ditto	In Nagri.	6 p. (1 a)
Act II of 1889 (Measures of Length)	In Urdu.	3 p. (1 a.)
Ditto	In Nagri.	3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu.	1 a. 9 p. (1 a.)
Ditto ditto	In Nagri.	2 a. (1 a)
Act VI of 1889 (Probate and Administration)	In Urdu.	6 p. (1 a)
Ditto	In Nagri	6 p. (1 a)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu	5 a. (2 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Nagri.	3 a (1 a p)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894	In Urdu.	9 p. (1 a)
Ditto ditto	In Nagri.	9 p. (1 a)
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu.	1 a. 6 p. (1 a.)
Ditto	In Nagri	1 a. 6 p (1 a)
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu.	3 p. (1 a)
Act I of 1890 (Revenue Recovery)	In Urdu.	3 p. (1 a)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu.	3 p. (1 a)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu.	6 p. (1 a)
Act VI of 1890 (Charitable Endowments)	In Urdu.	6 p. (1 a)
Act VIII of 1890 (Guardians and Wards)	In Urdu.	2 a. 3 p (1 a. 9 p.)
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu.	8 a. (2 a)
Act IX of 1890 (Railways), as modified up to 1st May, 1906	In Nagri.	8 a. (2 a)

Act X o 1890 (Press and Registration of Books Amendment)	In Urdu. 3 p. (1 a)
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu. 3 p. (1 a.)
Act XVIII of 1890 (Emigration Amendment)	In Urdu. 3 p. (1 a.)
Act XIX of 1890 (Salt Amendment)	In Urdu. 3 p. (1 a.)
Act XX of 1890 (North-Western Province and Oudh)	In Urdu. 1 a. (1 a.)
Act V of 1891 (Ports Act Amendment)	In Urdu. 3 p. (1 a.)
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu. 3 p. (1 a.)
Act XIV of 1891 (Oudh Courts)	In Urdu. 6 p. (1 a.)
Act XVIII of 1891 (Bankers Books Evidence), as modified by Acts I of 1893 and XII of 1900	In Urdu. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 6 p (1 a.)
Act II of 1892 (Christian Marriage Validation)	In Urdu. 3 p. (1 a)
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu. 6 p. (1. a)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ...	In Urdu. 3 p. (1 a.)
Act IV of 1893 (Partition)...	In Urdu. 3 p. (1 a.)
Act I of 1894 (Land Acquisition)	In Urdu. 2 a. 3 p. (1a. 6p.)
Ditto	In Nagri. 1 a. 6 p (1a. 6p.)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment) ...	In Urdu. 3 p. (1 a)
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu. 3 p (1 a.)
Ditto	In Nagri. 3 p (1 a.)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ...	In Urdu. 4 a. (1 a)
Ditto ditto	In Nagri. 3 a 9 p. (2 a)
Act IX of 1894 (Prisons)	In Urdu. 1 a. 3 p. (1 a)
Ditto	In Nagri 2 a. 3 p. (1 a.)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu. 3 p. (1 a)
Ditto ditto ...	In Nagri. 3 p (1 a.)
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu. 3 a. (1 a)
Act XIV of 1895 (Pilgrim Ships)	In Urdu. 1 a. 3 p. (1 a)
Act II of 1896 (Cotton-duties)	In Urdu. 1 a. 3 p. (1 a.)
Ditto	In Nagri 1 a (1 a.)
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu. 3 p. (1 a)
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a)
Act XII of 1896 (Excise), as modified up to 1st August 1905	In Nagri 3 a 3 p. (1 a.)
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a)
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu. 3 p. (1 a.)
Act III of 1897 (Epidemic Diseases)	In Urdu. 3p. (1 a)
Ditto	In Nagri. 3p. (1 a.)
Act IV of 1897 (Fisheries)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3p. (1 a)
Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu. 3p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a)
Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 9 p. (1 a)
Act VIII of 1897 (Reformatory Schools)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 9 p. (1 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ...	In Urdu. 9 p. (1 a)
Ditto ditto ...	In Nagri. 9 p (1 a)
Act X of 1897 (General Clauses)	In Urdu. 1 a. (1 a.)
Ditto	In Nagri. 1 a. (1 a)
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act XV of 1897 (Cantonments)	In Urdu. 3 p. (1 a.)
Act I of 1898 [Stage-carriages Act (1861) Amendment]	In Urdu. 3 p. (1 a.)

Act I of 1898 [Stage Carriages Act (1861) Amendment]	In Nagri.	3 *p.* (1 *a.*)
Act III of 1898 (Lepers)	In Urdu.	6 *p.* (1 *a*)
Ditto	In Nagri.	6 *p.* (1 *a.*)
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu.	3 *p.* (1 *a*)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1900	In Urdu.	Rs. 1-4. (8 *a.*)
Ditto ditto ...	In Hindi.	Rs. 1-6. (8 *a.*)
Act VI of 1898 (Post Office)	In Urdu.	2 *a.* (1 *a.*)
Ditto	In Nagri.	2 *a.* (1 *a.*)
Act IX of 1898 (Live-stock Importation)	In Urdu.	3 *p.* (1 *a*)
Ditto	In Nagri.	3 *p.* (1 *a*)
Act X of 1898 (Indian Insolvency Rules)	In Urdu.	3 *p.* (1 *a*)
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu.	6 *p* (1 *a.*)
Ditto ditto	In Nagri.	6 *p* (1 *a.*)
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu	7 *a.* 6 *p.* (1*a.* 6*p.*)
Ditto ditto . . .	In Nagri	7 *a.* 6 *p* (1*a.* 6*p.*)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ...	In Urdu.	2 *a.* 3 *p.* (1 *a.*)
Ditto ditto ...	In Nagri.	2 *a.* 3 *p.* (1 *a.*)
Act IV of 1899 (Government Buildings)	In Urdu.	3 *p.* (1 *a.*)
Ditto	In Nagri.	3 *p.* (1 *a.*)
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment] ...	In Urdu.	3 *p* (1 *a*)
Ditto ditto ...	In Nagri.	3 *p.* (1 *a*)
Act VIII of 1899 (Petroleum)	In Urdu.	9 *p.* (1 *a.*)
Ditto	In Nagri	9 *p.* (1 *a.*)
Act IX of 1899 (Arbitration)	In Urdu.	9 *p.* (1 *a.*)
Ditto	In Nagri.	9 *p.* (1 *a.*)
Act XI of 1899 (Court-fees Amendment)	In Urdu.	9 *p.* (1 *a.*)
Ditto	In Nagri.	6 *p.* (1 *a.*)
Act XII of 1899 (Currency Notes Forgery)	In Urdu.	3 *p.* (1 *a.*)
Ditto	In Nagri.	3 *p.* (1 *a.*)
Act XIV of 1899 (Tariff Amendment)	In Urdu.	3 *p.* (1 *a*)
Ditto	In Nagri.	3 *p.* (1 *a*)
Act XVII of 1899 (Indian Registration Amendment	In Urdu.	3 *p.* (1 *a.*)
Ditto ditto	In Nagri.	3 *p.* (1 *a.*)
Act XVIII of 1898 (Land Improvement Loans Amendment)	In Urdu.	3 *p.* (1 *a.*)
Ditto ditto	In Nagri.	3 *p.* (1 *a.*)
Act XX of 1899 (Presidency Banks)	In Urdu.	3 *p.* (1 *a.*)
Ditto	In Nagri.	3 *p.* (1 *a.*)
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu.	3 *p.* (1 *a.*)
Ditto ditto	In Nagri.	3 *p.* (1 *a.*)
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu.	1 *a.* 3 *p.* (1 *a.*)
Ditto ditto	In Nagri.	1 *a.* 3 *p.* (1 *a.*)
Act I of 1900 (Indian Articles of War Amendment)	In Urdu.	3 *p* (1 *a.*)
Ditto ditto	In Nagri.	3 *p.* (1 *a.*)
Act IV of 1900 [Indian Companies (Branch Registers)]	In Urdu	3 *p.* (1 *a.*)
Ditto ditto	In Nagri.	3 *p.* (1 *a.*)
Act IX of 1900 (Amendment) of Court-fees Act, 1870)	In Urdu.	3 *p.* (1 *a.*)
Ditto ditto	In Nagri.	3 *p.* (1 *a*)
Act X of 1900 (Census)	In Urdu.	9 *p.* (1 *a.*)
Ditto	In Nagri.	9 *p.* (1 *a*)
Act II of 1901 [Indian Tolls (Army)]	In Urdu.	6 *p.* (1 *a.*)
Ditto	In Nagri.	9 *p.* (1 *a.*)
Act III of 1901 (Indian Ports)	In Urdu.	3 *p.* (1 *a*)
Act V of 1901 [Indian Forest (Amendment)]	In Urdu.	3 *p.* (1 *a.*)
Ditto	In Nagri.	3 *p.*
Act VI of 1901 (Assam Labour and Emigration)	In Urdu.	5 *a.*

Act VI of 1901 (Assam Labour and Emigration)	In Nagri. 5 a. (2 a.)
Act VII of 1901 (Native Christian Administration of Estates) ...	In Urdu. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 p. (1 a.)
Act VIII of 1901 (Mines)	In Urdu. 1 a. (1 a.)
Ditto	In Nagri. 1 a. (1 a)
Act IX of 1901	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act X of 1901	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act II of 1902 [Cantonments (House-Accommodation)]	In Urdu. 1 a. (1 a).
Ditto ditto	In Nagri. 1 a. (1 a)
Act IV of 1902 (Indian Tramways)	In Urdu. 3 p. (1 a).
Ditto	In Nagri. 3 p. (1 a)
Act V of 1902 (Administrators General and Official Trustees)	In Urdu. 3 p (1 a)
Ditto ditto ...	In Nagri. 3 p. (1 a)
Act VII of 1902 [United Provinces (Designation)] ...	In Urdu. 3 p. (1 a)
Act VIII of 1902 (Indian Tariff)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p (1 a)
Act II of 1903 [Indian Post Office (Amendment)]	In Urdu 3 p. (1 a)
Ditto	In Nagri. (3 p 1 a)
Act III of 1903 (Electricity)	In Urdu. 2a 6p. (1 a. 6 p.)
Ditto	In Nagri. 2a. 6p. (1 a. 6 p.)
Act V of 1903 (Ports)	In Urdu. 3p. (1a) (2a 6p.)
Ditto	In Nagri, 3 p. (1 a.)
Act VII of 1903 (Works of Defence)	In Urdu, 1 a 3 p. (1 a.)
Ditto	In Nagri. 1 a. 3 p (1 a.
Act VIII of 1903 (Probate and Administration)	In Urdu. 3 p. (1 a.).
Ditto	In Nagri 1 a 3 p. (1 a)
Act IX of 1903 (Tea Cess)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p (1 a.)
Act X of 1903 (Victoria Memorial)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a)
Act XIII of 1903 (Lepers)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act XIV of 1903 (Indian Foreign Marriages)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ...	*In Urdu. 1 a. 9 p. (1 a)*
Ditto ditto ...	In Nagri. 1 a. 9 p (1 a.)
Act I of 1904 (Poisons)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a)
Act III of 1904 (Local Authorities Loan)	In Urdu. 3 p (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act IV of 1904 (North-West Border Military Police)	In Urdu. 9 p. (1 a.)
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p (1 a)
Act VII of 1904 (Ancient Monuments Preservation)	In Urdu. 9 p. (1 a)
Ditto ditto	In Nagri. 9 p. (1 a.)
Act VIII of 1904 (Indian Universities)	In Urdu. 1 a. 3 p (1 a)
Ditto	In Nagri. 1 a. 3 p. (1 a.)
Act X of 1904 (Co-operative Credit Societies)	In Urdu. 1 a. (1 a)
Ditto	In Nagri. 1 a (1 a.)
...II of 1[illegible] to revive and continue section 8 B of the Indian Tariff	In Urdu. 3 p (1 a.)
Ditto ...	In Nagri. 3 p. (1 a.)
... ...	In Urdu. 3 p. (1 a.)
... ...	In Nagri. 3 p. (1 a.)

Act XIII of 1904 (Indian Articles of War) ... ... In Urdu. *3 p. (1 a.)*
Ditto ... ... In Nagri. *3 p. (1 a.)*
Act XV of 1904 [Indian Stamp (Amendment)] ... ... In Urdu. *3 p. (1 a.)*
Ditto ... ... In Nagri. *3 p. (1 a.)*
Act I of 1905 [Local Authorities Loan (Amendment)] ... ... In Urdu *3 p. (1 a.)*
Ditto ditto ... ... In Nagri. *3 p. (1 a.)*
Act II of 1905 [Indian Universities (Validation)] ... ... In Urdu *3 p. (1 a.)*
Ditto ditto ... ... In Nagri. *3 p. (1 a.)*
Act III of 1905 (Indian Paper Currency) .. . ... In Urdu. *9 p. (1 a.)*
Ditto ... ... In Nagri. *9 p. (1 a.)*
Act IV of 1905 (Indian Railway Board) ... ... In Urdu. *3 p. (1 a.)*
Act VI of 1905 (Court-fees (Amendment) ... ... In Urdu *1 a. 6 p. (1 a.)*
Ditto ... ... In Nagri. *3 p. (1 a.)*
Act VII of 1905 (Bengal and Assam Laws) ... ... In Urdu. *3 p. (1 a.)*
Ditto ... ... In Nagri. *3 p. (1 a.)*
Regulation I of 1890 (British Baluchistan Laws) ... ... In Urdu. *2 a. (1 a. 9 p.)*
Regulation V of 1890 (British Baluchistan Forests) ... .. In Urdu. *2 a. (1 a. 6 p.)*
Regulation VI of 1893 (Hazara Forests) ... ... In Urdu *2 a. (1 a. 6 p.)*
Regulation VIII of 1896 (British Baluchistan Criminal Justice) ... In Urdu. *9 p. (1 a.)*
Regulation IX of 1896 (British Baluchistan Civil Justice) ... . In Urdu *2 a. 3 p. (1 a.)*
Regulation III of 1901 (Frontier Crimes) ... ... In Urdu *2 a. 6 p. (1 a.)*
Regulation IV of 1901 (Frontier Murderous Outrages) ... In Urdu *6 p. (1 a.)*
Regulation VII of 1901 (North-West Frontier Province) ... ... In Urdu. *4 a. 3 p. (1 a.)*

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Ditto *ditto* ... In Urdu and Nagri. 7 *a.* (2 *a.*)

Contents to ditto ditto ... In Urdu and Nagri. 1 *a.* 9 *p.* (1 *a.*)

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TABLE OF CASES CITED.

INDEX.

PAGE.

PAGE

Subordinate Judge" within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure, and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

1908
March 6.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

JAGAN NATH (PLAINTIFF) v. TIRBENI SAHAI AND OTHERS (DEFENDANTS).*

Act No. XIX of 1873, (N.-W. P. Land Revenue Act), sections 132, 241—Act (Local) No. III of 1901, (United Provinces Land Revenue Act), section 223 (k)—Partition—Civil and Revenue Courts—Jurisdiction.

A plaintiff came into Court upon the allegation that a certain grove had upon partition been wrongly allotted to the defendants' mahal whereas it should have been allotted to his (the plaintiff's) mahal, and he claimed a decree for a declaration of his title or for possession. *Held* that section 203 *(k)* of the United Provinces Land Revenue Act, 1901, barred the cognizance of such a suit by a Civil Court. *Kishen Prasad* v. *Kadher Mal* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgment of Banerji, J. The facts of the case sufficiently appear from the judgment under appeal which was as follows:—

BANERJI, J.—The facts of this case are these—The village Alipur was by an imperfect partition made in 1881 divided into 32 pattis. On the 5th of August 1892, Hira Lal, a co-sharer in the village, applied to the Revenue Court for perfect partition and prayed that certain pattis which belonged to him should be formed into a separate mahal. The defendants Tirbeni Sahai, Gomti Sahai and Musammat Suraj Kunwar, who were named as opposite parties to the application of Hira Lal, made an application on the 15th of December 1892 in which they asked that their pattis

*Appeal No. 82 of 1907 under section 10 of the Letters Patent.

(1) Weekly Notes, 1900, p. 11.

1908

JAGAN NATH
v.
TIRBENI SAHAI.

also should be formed into a separate mahal. On the 18th of August 1893 a partition proceeding was drawn up to the effect that 20 pattis should be formed into different mahals and 12 pattis, one of which was patti No. 32, should form a separate mahal to be called the mahal of the *non-applicants for partition*. Accordingly a partition was effected, which has been confirmed by the Collector. By this partition the village was divided into 26 mahals, the 26th mahal being that of the non-applicants for partition. The pattis of Tirbeni Sahai and others were included in mahal Hira Lal. In patti No. 32, which is the patti of the plaintiff and which was included in the 26th mahal, the mahal of the non-applicants for partition, there is a grove No. 623. This grove was allotted to the mahal in which the defendants are co-sharers. The plaintiff states that he has a half share in the grove, that the defendants have no right to that half share and that the inclusion of the whole of the grove in the defendants' share was improper. The plaintiff accordingly brought the present suit for a declaration of his right to a half share of the grove No. 623 and in the alternative for possession of that share. The court of first instance dismissed the suit as barred by the provisions of section 233, clause *(k)* of the Land Revenue Act (No. III of 1901). The lower appellate Court has set aside the decree of that Court and has decreed the plaintiff's claim. That Court was of opinion that as under the partition proceeding patti No. 32 was excluded from partition, the revenue authorities had no jurisdiction to include the grove in suit, which appertained to the said patti, in the mahal of the defendants. The learned Judge relies upon the decision of this Court in *Kishen Prasad* v. *Kadher Mal* (1). That case is clearly distinguishable from the present What happened in that case was that under a previous partition of the land of the village four mahals had been formed, one of which was called *patti shamilat*. Subsequently a partition of *patti shamilat* alone took place and certain land which appertained to one of the other three mahals was partitioned. It was held that this partition did not preclude the Civil Court from determining the plaintiff's right to a plot of land which was not the subject of the partition of the *mahal*

(1) Weekly Notes, 1900, p. 11.

shamilat. In the present case the whole of the village was under partition. The revenue authorities directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants for partition, was to consist of 12 pattis. If land which appertained to one of these 12 pattis was allotted to another of the mahals under the partition, that was a matter relating to partition and ought to have formed the subject of an appeal under section 132 of Act No. XIX of 1873, which was the Act under which the partition in question was effected. Rightly or wrongly, the revenue authorities allotted to the defendants' mahal what the plaintiff says ought to have been allotted to his mahal, namely, *the mahal of the non-applicants for partition.* This was clearly a question relating to the partition or union of mahals within the meaning of clause *(k)*, section 233 of Act No. III of 1901 and was therefore not cognizable by a Civil Court. The plaintiff mistook his remedy, and, instead of appealing against the order confirming the partition, he brought the present suit in a Civil Court. Such a suit falls within the prohibition of section 233 *(k)* and is not maintainable. The Court of first instance was in my judgment right. I accordingly allow the appeal, set aside the decree of the court below and restore that of the Court of first instance with costs in all Courts.

Against this judgment the plaintiff appealed.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C. J., and BURKITT, J.—We agree in the view taken by the learned Judge of this Court from whom this appeal has been preferred, and dismiss the appeal with costs.

1908
November 3.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KEDAR SINGH AND OTHERS (PLAINTIFFS) *v.* MATABADAL SINGH AND OTHERS (DEFENDANTS).*

Act No. VII of 1887 (Suits Valuation Act), section 8—Act No. VII of 1870 (Court Fees Act), section 7, clause xi—Valuation of suit—Suit for redemption of mortgage.

Held that the value for purposes of jurisdiction of a suit for redemption of mortgage is the amount of the principal mortgage money and not the value of the property mortgaged. *Kubair Singh* v *Atma Ram* (1) and *Amanat Begam* v. *Bhajan Lal* (2) followed The law as laid down in these cases has not been affected by the passing of Act No VII of 1887, section 8.

THIS was a suit for redemption of mortgage. The amount secured by the mortgage was Rs. 1,000, but the value of the property mortgaged was said to be Rs. 9,000. The suit was filed in the Court of the Subordinate Judge, who directed the plaint to be returned for presentation in the proper court upon the ground that the suit was within the jurisdiction of the Munsif. Against this order the plaintiff appealed to the High Court. At the hearing a preliminary objection was taken on behalf of the respondents that the valuation of the suit was rightly decided by the Subordinate Judge, and, such being the case, an appeal lay to the District Judge and not to the High Court.

Munshi *Gokul Prasad*, for the appellants.

Mr. *W. Wallach*, for the respondents.

AIKMAN and KARAMAT HUSAIN, JJ.—This is an appeal from an order of the learned Subordinate Judge of Jaunpur returning a plaint to the appellants for presentation in the Court of the Munsif. The suit was one for redemption of a mortgage, the amount secured by the mortgage being Rs. 1,000. In the plaint it is stated that the value of the property is Rs. 9,000. The learned counsel for the respondents takes a preliminary objection based on section 589 of the Code of Civil Procedure, *viz.*, that the appeal does not lie to this Court, but to the Court of the District Judge. This preliminary objection really raises the issue as to whether the plaintiffs' suit was cognizable by the Munsif or by the Subordinate Judge. If the "value" of the suit is to be taken to be the amount secured by the mortgage, then, under

* First Appeal No. 34 of 1908, from an order of Tajammul Husain, Subordinate Judge of Jaunpur, dated the 2nd of July 1907.

(1) (1883) I. L. R., 5 All., 332. (2) (1886) I. L. R., 8 All., 438.

1908

KEDAR SINGH v. MATABADAL SINGH.

section 19 (1) of Act No. XII of 1887, the plaint should have been filed in the Court of the Munsif and the action taken by the Subordinate Judge in returning it is right. In the case of *Kubair Singh* v. *Atma Ram* it (1) was held by Stuart, C.J., and Tyrrell, J., that the value of the subject-matter of a suit like the present was not the market value of the land, but the amount of the mortgage money. In the Full Bench case of *Amanat Begam* v. *Bhajan Lal* (2) a similar view was taken. The learned vakil for the appellants contends that, having regard to the provisions of section 8 of Act No. VII of 1887, an Act which was passed after the rulings referred to, those rulings are no longer law. That section provides that in suits other than those referred to in the Court Fees Act, section 7, paragraph ix, where court fees are payable *ad valorem* under the Court Fees Act, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. One of the kinds of suits referred to in paragraph ix of section 7 is a suit against a mortgagee for the property mortgaged. The present suit is one of that nature. But the section of the Suits' Valuation Act relied on by the appellants' learned vakil does not prescribe what is to be taken as the value of a suit for redemption. This being so, we think that the section relied on does not affect the rulings to which we have referred above. We must therefore sustain the preliminary objection. We direct that the memorandum of appeal be returned to the appellants for presentation in the proper Court. The respondents are entitled to their costs in this Court.

1908
November 27.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

JAGAR NATH SINGH AND ANOTHER (PLAINTIFFS) v. SHEO GHULAM SINGH (DEFENDANT).*

Civil Procedure Code, section 244—Execution of decree—Jurisdiction of Court executing a decree—Suit by representatives of mortgagor judgment-debtor for declaration of invalidity of mortgage.

Held that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings

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* Second Appeal No. 1102 of 1907 from a decree of E. F. Oppenheim, District Judge of Gorakhpur, dated the 29th of May 1907, reversing a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 31st of January 1907.

(1) (1883) I. L. R., 5 All., 332. (2) (1886) I. L. R. 8 All. 438.

1908

JAGAR NATH SINGH v. SHEO GHULAM SINGH.

as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been made. A separate suit therefore, on the part of such persons seeking a declaration that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of section 244 of the Code of Civil Procedure. *Lalidhar* v. *Chaturbhuj* (1) followed.

THE facts of this case are as follows:

One Musammat Raghubansa, a Hindu window, executed a mortgage in favour of Sheo Ghulam Singh. The mortgagee obtained a decree for sale on that mortgage on the 1st of April 1905. Thereafter the mortgagor died, and Jagar Nath Singh and others were brought upon the record of the execution proceedings as the reversionary heirs of the last full owner the husband of the mortgagor. The reversioners filed an objection to the sale upon the ground that the mortgage was executed by Musammat Raghubansa without legal necessity. Their objection was disallowed, and they then filed a suit for a declaration that the mortgaged property was not liable to be sold in execution of the mortgagee's decree. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim; but on appeal by the defendants the suit was dismissed by the District Judge as being barred by the provisions of section 244 of the Code of Civil Procedure. The plaintiffs thereupon appealed to the High Court.

Munshi *Iswar Saran* and Babu *Jogul Kishor*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the respondent.

STANLEY, C.J., and BANERJI, J.—*This appeal arises* out of a suit for a declaration that a share of certain zamindari property was not liable to be sold in execution of a decree obtained against a Hindu widow on foot of a mortgage executed by her. Musammat Raghubansa executed a mortgage in favour of the defendant Sheo Ghulam Singh and on foot of that mortgage Sheo Ghulam Singh obtained a decree for sale on the 1st of April 1905. After this date Musammat Raghubansa died, and thereupon the appellants, who claimed to be the reversioners of the

(1) (1899) I. L. R., 21 All., 277.

deceased owner, the husband of Musammat Raghubansa, were brought upon the record as the representatives of Musammat Raghubansa on an application under *section 89 of the Transfer of* Property Act for an order absolute. They filed an objection to the sale on the ground that the mortgage was executed by Musammat Raghubansa without legal necessity. Their objection was disallowed, and thereupon the suit out of which this appeal has arisen was filed for a declaration that the property was not liable to be sold in execution of the mortgage decree. The Court of first instance decreed their claim, but upon appeal the lower appellate Court reversed the decision of the Court below and dismissed the plaintiffs' suit, on the ground that it was barred by the provisions of section 244 of the Code of Civil Procedure. The learned advocate for the respondent admits that this section does not apply and that the learned District Judge was wrong in the view taken by him. The case is on all fours with that of *Liladhar* v. *Chaturbhuj* (1). In that case it was held by one of us and by Aikman, J., that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. In view of this decision the learned District Judge was clearly wrong. We therefore allow the appeal, set aside the decree of the lower appellate Court, and, as the appeal was decided upon a preliminary point, we remand the case under section 562 of the Code to that Court, with directions that it be reinstated in the file of pending appeals and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1899) I. L. R., 21 All., 277.

1908
November 27.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KANHAI LAL AND ANOTHER (OPPOSITE PARTY) *v.* CHHADAMMI LAL (APPLICANT).*

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal.

Held that when sanction to prosecute has been granted by a Court under the provisions of section 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. *Salig Ram* v. *Ramji Lal* (1), *Emperor* v. *Serh Mal* (2) and *Muthuswami Mudali* v. *Veeni Chetti* (3) referred to.

IN this case one Chhadammi Lal applied in the Court of the Munsif of Bareilly for sanction to prosecute Kanhai Lal and another for an offence punishable under section 193 of the Indian Penal Code. Their application was refused, upon which a further application was made to the District Judge who granted the sanction prayed for. The persons against whom the sanction had been granted thereupon applied to the High Court in its revisional criminal jurisdiction against the order of the District Judge.

Babu *Satya Chandra Mukerji*, for the applicants.

Babu *Sital Prasad Ghosh*, for the opposite party.

AIKMAN and KARAMAT HUSAIN, JJ.—One Chhadammi Lal applied to the Munsif for sanction to prosecute the present applicants for an offence punishable under section 193, Indian Penal Code. Sanction was refused by the Munsif. Chhadammi Lal then applied to the learned District Judge, who granted the sanction. The applicants have presented a petition which is headed as a "Criminal Revision" against the order of the District Judge. It may be taken as decided by the Full Bench in *Salig Ram* v. *Ramji Lal* (1) that this Court has no revisional powers on the criminal side to interfere with an order passed by a Civil Court granting sanction under the provisions of section 195, Code of Criminal Procedure. We are bound by that ruling, and must therefore hold that we have no power of interference in revision. But it is contended that apart from the revisional powers conferred on this Court by Chapter XXXII of the Code of

* Criminal Revision No. 856 of 1908, from an order of W. H. Webb, Esq., District Judge of Bareilly, dated the 17th of July 1908.

(1) (1903) I. L. R., 25 All., 554. (2) Weekly Notes, 1903, p. 102.
(3) (1907) I. L. R., 30 Mad., 352.

Criminal Procedure, we have power under section 195, clause (6) of that Code to revoke the sanction which the learned District Judge has given. In the case of *Muthuswami Mudali* v. *Veeni Chetti* (1) Mr. Justice Wallis expressed his opinion that it was never intended by section 195 that there should be more than one appeal in a case like the present. In the case of *King Emperor* v. *Serh Mal* (2) we expressed our concurrence with what was said by Wallis, J., in the case referred to. We see no reason to alter our opinion. We therefore hold that we have no power of interference in this case, and reject the application.

1908

KANHAI LAL *v.* CHHADAMMI LAL.

APPELLATE CIVIL.

1908
November 28.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.

SAGAR MAL (DEFENDANT) *v.* MAKHAN LAL AND OTHERS (PLAINTIFFS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 4 (5), 32 (2)—Rent free grant—"Holding"—"Tenant."

Held that a rent free grant is not a "holding," nor is the grantee a "tenant" within the meaning of the Agra Tenancy Act, 1901. *Abdul Karim v. Ramzan* (3) approved.

THE plaintiff in this case brought his suit in a Civil Court for partition of a rent-free holding. The Court of first instance (Munsif of Meerut) gave the plaintiff a decree, and this decree was in appeal confirmed by the Additional Judge. One of the defendants, Sagar Mal, appealed from this decree to the High Court, upon the ground that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition.

Pandit *M. L. Sandal*, for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

STANLEY, *C.J.* and BANERJI, *J.*—This appeal arises in a suit for partition of a rent free holding. Both the Courts below granted the plaintiff a decree. This appeal has been preferred by one of the defendants, Sagar Mal, and the only ground of appeal pressed

* Second Appeal No. 1284 of 1907 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 31st of May 1907, confirming a decree of Hari Mohan Banerji, Munsif of Meerut, dated the 12th of January 1907.

(1) (1907) I. L. R., 30 Mad., 382. (2) Weekly Notes, 1908, p. 102.
(3) Weekly Notes, 1908, p. 197.

1908

SAGAR MAL
v.
MAKHAN LAL.

before us is that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition. We are of opinion that this section does not apply to a rent free grantee. The section in question falls within Chapter II, which deals with "the devolution, transfer and division of tenancies." A tenant is defined in section 4, clause (5), and does not include a rent free grantee. A rent free grantee, as also a mortgagee of proprietary rights, is by that definition expressly excluded. Consequently a rent free grant does not appear to us to be a "holding" within the meaning of section 32. The word "holding" in that section means, we think, the holding of a tenant as defined by the Act. We may point out that the heading of section 32 is:—"Division of tenancies," that is the division of the holdings of tenants as defined in section 4. We may also point out that Chapter X of the Act deals with the resumption of rent free grants. A separate Chapter in the Act is devoted to these grants. This view was expressed by our brother Richards in the case of *Abdul Karim* v. *Ramzan* (1). Our learned brother, after referring at length to some of the sections of the Agra Tenancy Act, held that a suit for partition of land alleged to be rent free is not excluded from the jurisdiction of the Civil Court either by section 233 (*k*) of the Land Revenue Act or by section 32 of the Agra Tenancy Act. We therefore agree in the view expressed by both the Courts below and dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1908, p. 197.

1908
November 30.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

AYUB ALI KHAN (DEFENDANT) v. MASHUQ ALI KHAN (PLAINTIFF).*

Act No. XII of 1881 (North-Western Provinces Rent Act), section 9—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 22, 32 (2)—Occupancy holding—Succession—Suit for right to a share in an occupancy holding—Civil and Revenue Courts—Jurisdiction.

Held that a suit in a Civil Court for a declaration of the plaintiff's right to a share in an occupancy holding is not precluded by section 32 (2) of the Agra Tenancy Act.

Held also that there was nothing in the Rent Act of 1881 to prevent a woman becoming an occupancy tenant, and if she did so, on her death the tenancy would pass to her heirs and not the heirs of her husband.

THE facts out of which this appeal arose were as follows:—

An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the name of his widow, Musammat Rasul-un nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902, after the new Tenancy Act came into force. Upon her death her step-brother Mashuq Ali Khan endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the entire holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon Mashuq Ali Khan brought the present suit in the Civil Court for a declaration of his right to a moiety of the holding, for joint possession thereof and also for damages. The Court of first instance (Munsif of Bulandshahr) threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge of Aligarh held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the defendant Ayub Ali Khan appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the

* First Appeal No. 44 of 1908 from an order of Khettar Mohan Ghose, Additional Judge of Aligarh, dated the 8th of January 1908.

1908

Ayub Ali Khan v. Mashuq Ali Khan.

name of his widow, Mussammat Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902 after the new Tenancy Act came into force. Upon her death her step-brother Mashuq Ali Khan, plaintiff respondent, endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the whole holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon the plaintiff Mashuq Ali Khan brought a suit in the Civil Court for declaration of his right to a moiety of the holding, for joint possession thereof, and also for damages. The Court of first instance threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the present appeal has been preferred. Two pleas have been urged before us. One is that the suit is obnoxious to the provisions of section 32 (2) of the Agra Tenancy Act, which prohibits any suit for the division of a holding or distribution of the rent thereof being entertained by a Civil or Revenue Court. In our opinion this plea cannot prevail. If, having got his declaration, the plaintiff attempted to sue for actual division of the holding or distribution of the rent he might be met by this section. We do not think that this section prohibits a suit like the present. It was next urged that, having regard to the provisions of section 22 of the Act which provides for succession to tenancies, the plaintiff does not possess the right which he sets up. The decision of this plea is more difficult. After giving the point our best consideration, we are of opinion that under the circumstances of the case the plaintiff has the right of succession under section 22 of the Act. The plaintiff's sister succeeded under the former Act No. XII of 1881. Under section 9 of that Act the occupancy right devolved to her "as if it were land." She being a Muhammadan widow acquired in our opinion an absolute right to be considered an occupancy tenant. Succession to her occupancy right is governed by section 22 of the new Act. It is true that that section is worded as if males alone can be ex-proprietary, occupancy or non-occupancy tenants, but we can find nothing in the other provisions of the Act which would prevent a woman

acquiring such rights. There is nothing to prevent a woman being a tenant of agricultural land, and if she held it continuously for 12 years she would acquire a right of occupancy just as a man would. We cannot therefore attach to the fact that the words in section 22 are words importing only the masculine gender the weight which is sought to be placed upon them. We think that Musammat Rasul-un-nissa having been an occupancy tenant, her half brother, who, it is not denied, was the son of the same father, is entitled to succeed under clause (*c*) of the section. The same question was very fully considered by the members of the Board of Revenue in *Ikramuddin* v. *Irshad Ali* (1). There it was held that a Muhammadan widow who succeeded to an occupancy holding acquired an absolute estate, and that on her death, after the 1st of January 1902, the persons to succeed *will be her heirs and not the heirs of her deceased husband*. We agree in this view. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1908
December 1.

Before Mr. Justice Richards and Mr. Justice Griffin

JAGAN NATH (PLAINTIFF) v. DIBBO AND OTHERS (DEFENDANTS.)*

Act No. IV of 1882 (Transfer of Property Act), section 6—Hindu Law—Transfer by a Hindu reversioner of his reversionary interest.

Held that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. *Sham Sunder Lal* v. *Achhan Kunwar* (2) followed.

ON the 6th of September 1884, Tota Ram and Har Sukh, who then had a reversionary interest in certain property expectant on the death of a Hindu widow, Musammat Shitabo, executed a mortgage thereof in favour of one Jagan Nath. Musammat Shitabo was in possession, and her name was recorded in the revenue papers. The mortgage deed was registered and from the registration endorsement it appeared that the mortgagors appeared before the Sub-Registrar, acknowledged the deed and admitted receipt of the mortgage money. Musammat Shitabo died on the 5th October 1888. On the 18th of January 1906

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* First Appeal No 199 of 1906 from a decree of Kunwar Bahadur, Subordinate Judge of Shahjahanpur, dated the 18th April of 1906.

(1) Sel. Dec. Board of Revenue No. 2 of 1905. (2) (1898) I. L. R., 21 All., 71.

1908

JAGAN NATH v. DIBBO.

the mortgagee instituted the present suit against various transferees both from Musammat Shitabo and the mortgagors to enforce his mortgage. The Court of first instance (Subordinate Judge of Shahjahanpur) found that no consideration for the mortgage had actually passed, but that the mortgage was executed in order that the mortgagee might carry on litigation on behalf of the mortgagors against the widow. That Court therefore dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Maulvi *Muhammad Ishaq* and Babu *Durga Charan Banerji*, for the respondents.

RICHARDS AND GRIFFIN, JJ.—This was a suit to enforce a mortgage dated the 6th of September 1884. The defence was that the mortgage was without consideration, that the mortgagors had no power to mortgage the property and that the suit was barred by limitation. The admitted facts are that at the date of the mortgage one Musammat Shitabo was in possession as a Hindu widow, having succeeded her husband, one Bhola, who died childless. A number of transfers have since been made. Some of the defendants are the transferees of Musammat Shitabo and some are transferees of Tota Ram and Har Sukh the mortgagors named in the mortgage deed. The mortgage deed bears interest at the rate of 37½ per cent. per annum. Musammat Shitabo died on the 5th of October 1888, and no proceedings were taken until the institution of the present suit on the 18th of January 1906. The Court below has found that the deed was fictitious and that no consideration passed. The mortgage deed was registered, and it appears from the endorsement of the Registrar that the mortgagors appeared before him, ackowledged the deed and admitted receipt of the mortgage money. The money was not paid before the Sub-Registrar, and Jagan Nath, the mortgagee, produces no receipt. The defendants' witnesses depose that Tota Ram and Har Sukh were very poor persons and that they entered into an arrangement with Jagan Nath that Jagan Nath should carry on litigation for them, and in the event of its being successful, the property was to be shared and that as part of this arrangement the mortgage in suit was

executed; that the Rs. 2,000 was never paid, and that Jagan Nath did not carry on the litigation. That there was litigation going on at that time is very clear, and the nature of the litigation appears. It was a suit by Har Sukh and Tota Ram to set aside alienations made by Musammat Shitabo on the ground that she as Hindu widow had no right to alienate the property she had succeeded to as widow of Bhola. It further appears that Shitabo was entered as the owner at this very time in the public *khewat.* We see no reason to differ from the finding of the learned Subordinate Judge that there was no consideration for the mortgage. Jagan Nath years ago instituted a suit on another bond executed by Har Sukh in his favour without any mention of the present bond, though the latter was for a much larger amount. It has been held by the Privy Council in the case of *Sham Sunder Lal* v. *Achhan Kunwar* (1) *that it is not competent for a Hindu reversioner to* transfer his reversionary interests expectant on the death of Hindu widow. See also the case of *Nund Kishore Lal* v. *Kanee Ram Tewary* (2). It is, however, contended on behalf of the plaintiff that he can call to his aid the provisions of section 43 of the Transfer of the Property Act, 1882, which provides that "where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." This section, of course, cannot apply if the deed was really without consideration, but even if there was some consideration for the deed, it would be necessary for the plaintiff to show that there was an erroneous representation by Har Sukh and Tota Ram that they were in possession of the property at the date of the mortgage. Jagan Nath when examined did not attempt to show that he did not know that Musammat Shitabo was in possession as a Hindu widow, or that there was any representation to him which made him think that Har Sukh and Tota Ram were in possession of the estate. On the other hand he says that he was told that money was wanted for litigation, and we know from the evidence on the record that the nature of this litigation was to set aside

(1) (1898) L. R., 25 I. A., 183. (2) (1902) I. L. R., 29 Calc., 355.

1908

JAGAN NATH v. DIBBO.

alienations by Musammat Shitabo, and that Musammat Shitabo was alive and was a party to the litigation. Both these grounds are fatal to the plaintiff's case. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1908 December 1

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KANDHYA LAL (APPLICANT) v. MANKI (OPPOSITE PARTY).*

Act No. V of 1881 (Probate and Administration Act), section 78—Act No. IX of 1872 (Indian Contract Act), section 129—Administration—Surety—Continuing guarantee.

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, this is not a continuing guarantee within the meaning of section 129 of the Indian Contract Act, 1872. Such a surety cannot of his own free will withdraw from his suretyship *Subroya Chetty v. Ragammal* (1) followed. *Raj Narain Mookerjee v. Ful Kumari Debi* (2) dissented from.

IN this case letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Musammat Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate. One Kandhya Lal became surety. Less than six months afterwards Kandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Musammat Manki to provide a fresh surety. The District Judge rejected this application. The surety thereupon appealed to the High Court.

Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—The respondent Musammat Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Kandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammat Manki

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* First Appeal No. 64 of 1908 from an order of G. A. Paterson, District Judge of Benares, dated the 30th of March 1908.

(1) (1905) I. L. R., 28 Mad., 161. (2) (1902) I. L. R., 29 Calc., 68.

to furnish a fresh surety. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a surety bond given under the circumstances stated can be cancelled—see *Raj Narain Mookerjee* v. *Ful Kumari Debi* (1) and *Subroya Chetty* v. *Ragammal* (2). The former Court held that a surety bond given under the circumstances stated is a continuing guarantee within the meaning of section 129 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administratrix had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says :— "I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged." If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammat Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) I. L. R., 29 Calc., 68. (2) (1905) I. L. R., 28 Mad., 161.

MISCELLANEOUS CIVIL.

1908
December 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHOGA LAL (PLAINTIFF) *v.* PIYARI AND ANOTHER (DEFENDANTS.)*

Act No. IX of 1872 (Indian Contract Act), section 23—Contract—Agreement immoral or opposed to public policy—Lease of house to a prostitute.

Held that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy; and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a court of law.

A SUIT for arrears of rent of two huts (Nos. 307 and 309, Sudder Bazar, Jhansi), rented jointly from the plaintiff by two prostitutes, Piyari and Kallo, was brought in the Court of the Cantonment Magistrate of Jhansi exercising powers of a Court of Small Causes. The defendants pleaded that recovery of rent was barred, inasmuch as to the plaintiff's knowledge the huts were rented by the defendants for immoral purposes, and reference was made to the case of *Goureenath Mookerjee* v. *Madhomonee Peshakur* (1). The Court referred the case to the High Court under the provisions of section 617 of the Code of Civil Procedure.

Babu *Harendra Krishna Mukerji*, for the plaintiff.

Lala *Girdhari Lal Agarwala*, for the defendants.

STANLEY C. J., and BANERJI, J.—This is a reference made by the learned Cantonment Magistrate of Jhansi exercising the powers of a Judge of a Court of Small Causes, under section 617 of the Code of Civil Procedure. The question which he submits for the opinion of the Court is whether the English law is operative in a suit to recover rent due for a residence or quarters rented to a prostitute, with knowledge that such residence or quarters would be used by her to carry on her immoral trade and profession. It seems to us unnecessary to determine whether the English law is applicable in this country, because we find that there is an express provision of the Indian Contract Act under which a contract for such a purpose would be illegal. Section 23 of that Act provides that the consideration or object of an agreement is lawful, unless,

*Miscellaneous No. 271 of 1908.

(1) (1892) 18 W. R., 445.

amongst other things, the Court regards it as immoral or opposed to public policy. If the object of an agreement is immoral or oppossed to public policy, clearly the agreement cannot be enforced. It cannot be denied that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy, and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. This is the answer which we give to the reference.

REVISIONAL CIVIL.

1908 December 5.

Before Mr. Justice Aikman, and Mr Justice Karamat Husain.

IN THE MATTER OF THE PETITION OF KEDAR NATH.*

Act No. XVIII of 1879 (Legal Practitioners Act), section 36—Order declaring certain persons to be touts—Revision—Jurisdiction—Practice—Statute 24 and 25 Vict, Cap. CIV, section 15—Rules of High Court of the 18th January, 1898, rules 1 (xiii) and 4.

The District Judge of Meerut held an inquiry under section 36 of the Legal Practitioners Act, 1879, as the result of which he ordered certain persons to be proclaimed to be touts and excluded from the precincts of the courts in the judicial division. The parties affected applied to the High Court against the Judge's order under section 15 of Statute 24 and 25 Vict, Cap CIV. On this application being laid before a division Bench for disposal it was *held* :—

Per KARAMAT HUSAIN, J, that the disciplinary powers of the High Court under section 15 of the Statute being exerciseable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application neither had a single Judge jurisdiction to admit it.

Per AIKMAN, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, and rule 1 (xiii) of the Rules of Court of the 18th January 1898 effected such a delegation. But the powers of the Court under section 15 of the Statute were limited, and in this instance no case for their exercise had been shown. *Tej Ram* v. *Har Sukh* (1) and *Muhammad Suleman Khan* v. *Fatima* (2) referred to.

IN this case the District Judge of Meerut had taken proceedings under section 36 of the Legal Practitioners' Act against certain persons alleged to be touts, and by an order dated the 15th

* Civil Revision No. 50 of 1908, from an order of L. Stuart, Esq, District Judge, Meerut, dated the 15th of June 1908.

(1) (1875) I. L. R., 1 All, 101. (2) (1886) I. L. R., 9 All, 104.

1903

IN THE MATTER OF THE PETITION OF KEDAR NATH.

June 1903 had directed that a list should be prepared of the names of eleven persons who were found to be touts and hung up in his own Court and in all Courts subordinate to his, including the rent courts. Against this order Kedar Nath, one of the persons affected thereby, applied to the High Court under section 15 of the Charter Act.

Mr. *E. A. Howard*, (with whom Mr. *R. K. Sorabji* and Babu *Parbati Charan Chatterji*) for the applicant, argued that the procedure of the District Judge was defective in that the evidence against the alleged touts was taken behind their backs. It was not sufficient that the evidence was shown to the persons affected thereby: they should have been allowed to cross-examine the witnesses against them.

It was also argued that under the Charter Act the powers given by section 15 were exerciseable only by the whole Court and not by a bench of two Judges, and the cases of *In the matter of Kuar Bahadur* (1) and *Lal Singh* v. *Ghansham Singh* (2) were referred to as to the practice of the Court.

It was further contended that at any rate the order could have no application to Revenue Courts, which were not subordinate to the District Judge.

The Government Advocate (Mr. *W. Wallach*), in support of the Judge's order pointed out that the Judge's procedure had been in accordance with that adopted by the High Court in the case of *Kuar Bahadur* (1). He had acted in a regular manner and made an exhaustive enquiry and the applicant had been given an opportunity to cross-examine the witnesses.

As to the question of the jurisdiction of the Bench, that he submitted, was covered by the rules of Court, rules 1 (xiii) and 4 of which gave power to a Division Bench to hear cases of the nature of the present. If, however, it was necessary that the powers given by section 15 of the Charter Act must be exercised by the whole Court, then the application was not yet before the Court at all, a single Judge having no power to admit it.

As to whether the District Judge's order could apply to Rent Courts, it was argued that in several matters the Collector was subordinate to the District Judge, though in others he was

(1) Weekly Notes, 1896, p. 107. (2) Weekly Notes, 1897, p. 179.

not; but the language of section 36 of the Legal Practitioners' Act was wide enough to include the Rent Courts. In any case the Collector and District Magistrate were the same, and it made no practical difference whether the applicant was excluded from a particular place as the District Magistrate's Court or as the Collector's.

KARAMAT HUSAIN, J.—The learned District Judge of Meerut acting under section 36 of the Legal Practitioners' Act, (Act No. XVIII of 1879) by his order, dated the 15th June 1908, framed a list containing the names of 11 persons who by the evidence of general repute were proved to his satisfaction to habitually act as touts, and directed it to be hung in his own Court and in all Courts subordinate to him, including the rent Courts. The appellant Kedar Nath is one of the persons whose name is on that list. He has applied for the revision of that order of the learned District Judge. There is no appeal from such an order, nor is there any revision, either under section 439 of the Code of Criminal Procedure or section 622 of the Code of Civil Procedure. The only section under which the High Court has been held entitled to interfere with an order passed under section 36 of the Legal Practitioners' Act is section 15 of the High Courts Act, 24 and 25 Vict., Cap. 104. In the application for revision there is no ground to the effect that section 15 of the High Courts Act gives the power of superintendence to the whole Court, and not to a Bench of two Judges, and that therefore this Bench has no jurisdiction to dispose of this revision, but, as the ground deals with the jurisdiction of the Court and is of great importance, we allowed the learned counsel for the applicant to argue it. He contends that section 15 of the said Act gives the High Court power to "call for returns," to make general rules for regulating the practice and proceedings of the Courts subject to its appellate jurisdiction, and to prescribe forms for every proceeding in the said Courts, and no one can contend that a Bench of two judges of this Court has power to do any of the above acts, and that as the power of superintendence is also given by the same section a Bench of two Judges has no power to exercise it. If it has such a power the result will be that the whole Court will be bound by the Act of two

1908

IN THE MATTER OF THE PETITION OF KEDAR NATH.

Judges only. The learned Government Advocate in answer to this contention says that Rule 4 of the Rules of the High Court, which is as follows:—"Save as prescribed by law or by these rules or by special order of the Chief Justice every other case shall be heard and disposed of by a Bench of two Judges," gives this Bench a power to dispose of the application for revision, which undoubtedly is a case, and for which there is no provision in the rules of the High Court. He also argues that there has been a course of decisions in this Court as well as in other courts in which the cases under section 36 of the Legal Practitioners' Act have been dealt with by a Bench of two Judges and not by the High Court as a whole, and that t objection as to the jurisdiction of a Bench of two Judges to deal with the matter has never been taken. See I. L. R., 1 All., 101; I. L. R., 9 All., 101; I. L. R., 21 All., 181; Miscellaneous No. 39 of 1901, decided on the 6th June 1901; Miscellaneous No 127 of 1904, decided on the 22nd February 1905, and the cases under section 36 of the Legal Practitioners' Act in the other High Courts quoted on p. 1040, under section 15 of the High Courts Act, in the Code of Civil Procedure by O'Kinealy, 6th edition.

In my opinion the contention of the learned counsel for the applicant is well founded. The power of superintendence conferred upon the High Court by section 15 of the High Courts Act, which power has been extended to interference with the orders passed under section 36 of the Legal Practitioners' Act, is no doubt conferred upon the whole of the High Court and not upon a Bench of two Judges. Rule 4 of the High Court Rules, owing to the saving clause, "save as provided by law," does not empower a Bench of two Judges to dispose of the Revision, inasmuch as that power under section 15 of the High Courts Act vests in the whole Court.

There exists, no doubt, a course of decisions in which the case under section 36 of the Legal Practitioners' Act have been disposed of by a Bench of two Judges, but in none of these cases was the question of jurisdiction raised, and in the absence of any decision on that point the course can be no authority for the provisions that a Bench of two Judges has jurisdiction to deal with

a case of this nature under section 15 of the High Courts Act. To infer a rule of law from the silence of the Judges is inconsistent with their function.

For these reasons I am of opinion that this Bench has no jurisdiction to dispose of the revision. It follows from what has been said that a single Judge of this Court has also no power to admit a revision from an order passed by a District Judge under section 36 of the Legal Practitioners' Act. The application for revision is not therefore properly before this Bench and the learned counsel for the applicant on his own showing has no *locus standi* to be heard. I would therefore reject the application.

AIKMAN, J.—This is an application by one Kedar Nath for the revision of an order of the learned District Judge of Meerut passed under the provisions of section 36 of the Legal Practitioners Act, 1879, whereby he directed that a list should be prepared of the names of eleven persons, one of them being the applicant Kedar Nath, who had been proved to his satisfaction to act habitually as touts, and ordered this list should be hung up in his own Court and in all Courts subordinate to him. He further ordered that the persons whose names were entered in these lists should be excluded from the precincts of these Courts.

The petitioner is represented here by learned counsel who has argued the case with much ability.

The Legal Practitioners' Act confers on this Court no right of interference by way of appeal or revision in the case of an order under section 36, nor is any right of interference conferred by the Code of Civil Procedure or the Code of Criminal Procedure. It has been held, however, that this Court can interfere with such an order under the general powers of superintendence over subordinate Courts which are conferred on High Courts by sections 15, 24 and 25 Vict, Cap. CIV, though, as will be seen from the Full Bench decisions in *Tej Ram* v. *Har Sukh* (1), and *Muhammad Suleman Khan* v. *Fatima* (2), its powers of interference under that section are very limited.

The learned counsel took objection to the competence of this Bench to hear this case. He contended in the first place with

(1) (1876) I. L. R., 1 All., 101. (2) (1886) I. L. R., 9 All., 104.

1908

IN THE MATTER OF THE PETITION OF KEDAR NATH

reference to Rule 2 of the Rules of Court, that the case must be heard by a Bench of at least three Judges. The case is not a charge against a legal practitioner, and I hold it is not a disciplinary case within the meaning of the rule. I would therefore overrule this contention

Mr. *Howard* next contended that with reference to the language of sections 15, 24 and 25 Vict., Cap CIV, this case could only be dealt with by the Full Court. This is an ingenious argument. I think it must be admitted that no division Bench of the Court could *of its own authority* take upon itself to exercise the powers conferred by that section. But it appears to me that the Court has an inherent right to delegate to one or more of its members the power to deal with applications such as the present asking the Court to exercise the power of superintendence conferred by the section, and that it is not necessary that such cases should be dealt with by the Full Court. That the Court has delegated that power is clear from Rule 1 (xiii) and Rule 4. It would be in the highest degree inconvenient if every application under section 15 had to be dealt with by the whole Court. That Division Benches of the various High Courts have been in the habit of dealing with applications under section 15 is shown by numerous reported cases. I think for these reasons that Mr. *Howard's* second contention must be overruled.

Moreover, if his contention were held to be valid it would follow that the single Judge who issued the rule in this case had no power to issue it.

As stated above, the right of this Court to interfere under section 15 with the proceedings of a subordinate Court is strictly limited. It cannot interfere to correct an error of fact or even an error of law. See the cases cited above. All it can do is to direct a Court to exercise jurisdiction when it has declined to deal with a case within its jurisdiction or to abstain from taking action in matters of which it has not cognizance.

My only doubt in this case was whether the District Judge had power to make his order applicable to Rent Courts. These Courts are not subordinate to the District Judge in all branches of their work, but in certain classes of cases they are. I am not

therefore prepared to say that the order so far as it referred to Rent Courts was entirely without jurisdiction.

1908

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In my opinion no good ground has been made out for interference and I would dismiss the application.

BY THE COURT.—The order of the Court is that the application is dismissed.

APPELLATE CIVIL.

1908
December 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.
MUHAMMAD YAHIYA AND OTHERS (PLAINTIFFS) v. RASHID-UD-DIN (DEFENDANT) *

Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.

In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. *Ibn Husain* v. *Ram Dai* (1) and *Ibn Hasan* v. *Brijbhukan Saran* (2) referred to.

THIS was a suit for contribution arising out of the following facts. There was a mortgage executed by the plaintiffs and some of the defendants and the predecessors of others on the 20th of August 1892. A decree for sale was obtained on it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. The plaintiffs came into Court alleging that their property had contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. They therefore claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court of first instance, relying on the case of *Ibn Hasan* v. *Brijbhukan Saran* (2), dismissed the suit upon the ground that the whole of the mortgage money was not realized by sale of the plaintiff's property alone. The plaintiffs appealed to the High Court.

*First Appeal No 155 of 1906, from a decree of Raj Nath, Subordinate Judge of Allahabad, dated the 29th of May 1906.

(1) (1889) I. L. R., 12 All., 110. (2) (1904) I. L. R., 26 All., 407.

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(1) (1889) I. L. R., 12 All., 110. (2) (1904) I. L. R., 26 A[illegible]

1908

MUHAMMAD YAHIYA v. RASHID-UD-DIN.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Tej Bahadur Sapru*, for the respondent.

BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs in respect of a mortgage executed by them and by some of the defendants and the predecessors in title of other defendants. The mortgage was made on the 20th of August 1892, and a decree was obtained on the basis of it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. One of the mortgagors whose property was sold has already sued for and obtained a decree for contribution. The present suit was brought by the plaintiffs for contribution against those of the mortgagors or their representatives whose interests in the mortgaged property were not sold by auction. The allegation of the plaintiffs is that their property has contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. The plaintiffs accordingly claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court below has dismissed the suit simply on the ground that the whole of the mortgage money was not realized by the sale of the plaintiffs' property alone, and in support of its opinion it has relied on the decision of this Court in the case of *Ibn Hasan* v. *Brijbhukan Saran* (1). In my judgment the Court below has misunderstood that ruling. According to the view which I took in that case the present suit was clearly maintainable. But even according to the opinion of the majority of the Judges who decided that case the suit is also maintainable. What was held in that case was that unless the whole amount of the mortgage had been discharged, a suit for contribution was not maintainable. In the present case the whole of the mortgage money has admittedly been realized by the sale of the property of some of the mortgagors, and therefore the plaintiffs have a right of contribution if the sale of their property has discharged more than their rateable share of the debt. The question in the case referred to above was whether a suit for contribution

(1) (1904) I. L. R., 26 All., 407.

could be maintained unless the whole amount of the mortgage was discharged, and the majority of the Judges constituting the Bench answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in *Ibn Hasan* v. *Brijbhukan Saran* (1) upon which reliance has been placed by the appellants' learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contirbution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of *Ibn Hasan* v. *Ram Dai* (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that *other* property alone.

BY THE COURT:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded

(1) (1904) I. L. R., 26 All., 407. (2) (1889) I. L. R., 12 All., 110.

10

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General Acts of the Governor General of India in Council, Vol. VI, from 1891 to 1898. Edition 1898 ... ... - ... Rs 7. (10 a)

General Acts of the Governor General of India in Council, Vol VII, from 1899 to 1903, inclusive. Edition 1904 ... ... Rs. 3. (6 a)

C —LOCAL CODES.

The Ajmer Code, Third Edition, 1905, containing the Enactments in force in Ajmer-Merwara, with an Appendix consisting of a list of the Enactments which have been declared in force in, or extended to Ajmer-Merwara by notification under the Scheduled Districts Act, 1874; a Chronological Table and an Index . .. . Rs. 2-8. (7 a.)

The Baluchistan Code, Edition 1900, containing the local enactments in force in British Baluchistan and the Agency territories, with Chronological Tables and an Index .. .. Rs. 5 (10 a.)

The Burma Code. Edition 1899 . ... Rs. 5 (9 a)

The Central Provinces Code, Third Edition, 1905, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces, with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act, 1874; and an Index ... ... Rs. 4. (6 a.)

The Madras Code, Vols. I and II. Edition 1902 .. .. Rs. 12. (Re. 1.)

The Punjab and North-West Code, Edition 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North-West Frontier Provinces, with Appendix and Index ... ... Rs. 6. (10 a.)

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act	Price
Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893 (with footnotes brought down to 1st December, 1901	7 a. (1 a.)
Act XX of 1847 (Copyright), as modified up to 1st December, 1903	5 a. (1 a)
Act XVIII of 1850 (Judicial Officers' Protection) with footnotes	1 a. 9 p. (1 a)
Act XIX of 1850 (Apprentices), as modified up to 1st May, 1905	3 a 6 p. (1 a)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	2 a. 6 p. (1 a)
Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897	2 a 6 p. (1 a)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	1 a. (1 a.)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	2 a. (1 a)
Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903	1 a. 6 p. (1 a)
Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903	7 a (1 a)
Act IV of 1857 (Tobacco, Bombay Town) as modified up to 1st August, 1895,	3 a. 9 p. (1 a.)
Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st December, 1895	4 a. (1 a)
Act III of 1858 (State Prisoners), as modified up to 1st August, 1897	2 a (1 a.)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	4 a. 3 p. (1 a.)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	2. 3 p (1 a.)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	6 a. (1 a.)
Act I of 1859 (Merchant Shipping), as modified up to 30th June, 1905	13 a. (2 a)
Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August, 1906	4 a. (1 a.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	1 a. 6 p. (1 a.)
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904	1 a. 6 p. (1 a.)
Act XXI of 1860 (Societies Registration), as modified up to 1st December, 1904	2 a. 9 p. (1 a.)
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April, 1903, with an Index	Rs. 2-8. (5 a)
Act V of 1861 (Police), as modified up to 7th March, 1903	7 a. 6 p. (1 a 6 p.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	3 a. 6 p (1 a.)
Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December, 1898	4 a 9 p. (1 a.)
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	3 a. 6 p. (1 a.)
Act VI of 1864 (Whipping), as modified up to 1st August, 1905	3 a. 6 p. (1 a.)
Act XVII of 1864 (Official Trustees), as modified up to 1st July, 1890	5 a 6 p. (1 a.)
Act III of 1865 (Carriers), as modified up to 31st May, 1903	3 a. (1 a.)
Act X of 1865 (Succession), as modified up to 1st July, 1890	Re. 1-8. (2 a.)
Act III of 1867 (Gambling), as modified up to 1st January 1905	4 a. (1 a)
Act V of 1869 (Indian Articles of War), as modified up to 1st December, 1904	Re. 1-2. (3 a.)
Act XX of 1869 (Volunteers), as modified up to 1st May, 1896	4 a. 9 p. (1 a.)
Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1906	6 a. (1 a.)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	7 a. (1 a)
Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904	10 a. (2 a)
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	3 a 6 p. (1 a.)

Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... ... 3 a. 9 p. (1 a.)

Act II of 1874 (Administrator-General), as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act ... 11 a. (2 a.)

Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901 ... ... 6 a 6 p. (1 a.)

Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895 ... ... 6 a. (1 a.)

Act XV of 1874 (Laws Local Extent), as modified up to 1st October, 1895 ... 7 a. (1 a)

Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906 ... 2 a. (1 a.)

Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... 11 a. (1 a 6 p.)

Act III of 1877 (Registration), as modified up to 1st August, 1905 ... 11 a. (2 a.)

Act VII of 1878 (Forests), as modified up to 1st December, 1903 ... 10 a. (2 a.)

Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 .. ... 6 a. (1 a. 6 p)

Act XVII of 1879 (Dekkhan Agriculturists' Relief, as modified up to 1st March, 1895 .. .. 10 a. (2 a.)

Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 ... 7 a. 6 p. (1 a.)

Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891 ... . 10 a. (2 a)

Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890 ... ... 12 a. (2 a.)

Act XV of 1881 (Factories), as modified up to 1st December, 1904 ... 5 a. 6 p. (1 a 6 p)

Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897 ... ... 10 a. (1 a.)

Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905 ... ... Re. 1-2. (2 a.)

Act II of 1882 (Trusts), as modified up to 1st June, 1903 ... ... 10 a. (1 a.)

Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 ... ... 15 a. (2 a.)

Act V of 1882 (Indian Easements) as amended by the Repealing and Amending Act, 1891 (XII of 1891) ... ... 8 a. (1 a.)

Act VI of 1882 (Companies) as modified up to 1st August, 1906 ... Re. 1-10 a. (3 a.)

Act XII of 1882 (Salt), as modified up to 1st December 1890 .. ... 6 a. (1 a)

Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899 ... ... Rs. 3. (8 a.)

Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906 ... ... 10 a. (2 a.)

Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904 ... ... 6 a (1 a.)

Act VIII of 1883 (Little Cocos and Preparis Island), as modified up to 1st October, 1902 .. .. 1 a. 3 p. (1 a.)

Act XIX of 1883 (Land Jmprovement Loans), as modified up to 1st September, 1906 ... . 2 a. 6 p. (1 a.)

Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ... 11 a. (2 a)

Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ... 9 a. (2 a.)

Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ... 6 a. (1 a.)

Act XII of 1884 (Agriculturists, Loans), as modified up to 1st February, 1903 ... . 2a. (1 a)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... ... 7 a. (1 a)

Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905 ... 5 a. (1 a.)

Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ... ... 8 a. (1 a 6 p)

Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ... ... 6 a. (1 a.)

[illegible] as modified up to 1st December, 1903 ... 9 a. (2 a.)

[illegible] XII of 1891 ... ... 2 a. 9 p. (1 a.)

[illegible] to 1st October, 1904 ... 1 a. 9 p. (1 a)

Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... ... 6 a. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... 8 a. (1 a.)
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ... ... 9 a. (2 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 a. 9 p. (1 a.)
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... ... 5 a. 6 p. (1 a.)
Act X of 1889 (Ports), as modified up to 1st April, 1901 ... ... 11 a. (2 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ... 7 a. (1 a.)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... 3 a. (1 a.)
Act IX of 1890 (Railways), as modified up to 1st June, 1905, with an Index ... ... Re. 1-2. (2 a.)
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ... ... 2 a. 3 p. (1 a.)
Act XII of 1891 (Repealing and Amending Act), shewing the schedules as modified up to 31st May, 1902 ... ... 12 a. (1 a. 6 p.)
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... ... 1 a. 3 p. (1 a.)
Act I of 1894 (Land Acquisition), with footnotes ... ... 7 a. (1 a.)
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ... ... 9 a (2 a.)
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... 7 a. 6 p. (1 a. 6 p.)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... 1 a 6 p. (1 a.)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1903 ... ... Rs. 3-10. (8 a.)
Act VIII of 1899 (Petroleum), as modified up to 1st December, 1904 ... 7 a. (1 a.)
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... ... 1 a (1 a.)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ... ... 6 a 6 p. (1 a.)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... 5 a 6 p (1 a)
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... 6 a. 6 p. (1 a.)
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... 1 a. 9 p (1 a)
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a.)
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 ... ... 13 a. (2 a.)
Regulation VI of 1886 (Ajmer Rural Boards) as modified up to 1st February, 1897 ... ... 5 a 6 p. (1 a.)
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891 ... ... 5 a. (1 a.)
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... 4 a. 9 p. (1 a.)
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 ... ... 6 a (1 a)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1908.
Regulations made under the Statute 30 Vict, Cap. 3, from No. II of 1875 to 1908. 8vo. Stitched.

[The above may be obtained separately. The price is noted on each].

IV—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1893, with foot-notes brought down to 1st December, 1901 ... In Urdu. 2 a. 6 p. (1 a.)
Act XX of 1847 (Copyright), as modified up to 1st May, 1890 ... ... In Urdu. 1 a. 3 p. (1 a.)

Act XX of 1847 Copyright as modified up to 1st May, 1896 ...	... In Nagri. 1. a. 3 p. (1 d.)
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	... In Urdu. 6 p (1. a.)
Ditto ditto ...	... In Nagri. 6 p. (1 a.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 ...	In Urdu. 6 p. (1 a.)
Ditto ditto	... In Nagri. 6 p. (1 a.)
Act XXX of 1852 (Naturalisation), as modified up to 1st December, 1902 ...	In Urdu 6 p. (1 a)
Ditto ditto	... In Nagri. 6 p. (1 a.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	... In Urdu. 3 p. (1 a.)
Ditto ditto	... In Nagri. 3 p. (1 a)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903...	In Urdu. 6 p. (1 a.)
Ditto ditto	... In Nagri. 6 p. (1 a)
Act XX of 1856, as modified up to 1st November, 1903 ...	... In Urdu. 2 a. 6 p. (1 a.)
Ditto ditto	... In Nagri. 2 a. 6 p. (1 a.)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	... In Urdu. 1 a (1 a)
Ditto ditto	... In Nagri. 1 a. (1. a.)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	.. In Urdu. 1 a (1. a.)
Ditto ditto	... In Nagri. 1. a (1 a)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 ..	In Urdu. 1 a 6 p. (1 a.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	... In Urdu. 3 p. (1 a)
Ditto ditto	... In Nagri. 3 p. (1 a.)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	... In Urdu. 3 p. (1 a.)
Ditto ditto	... In Nagri. 3 p. (1 a.)
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	... In Urdu. Re. 1-5 (5 a.)
Ditto ditto	.. In Nagri. Re. 1-5 (5 a)
Act V of 1861 (Police), as modified up to 7th March, 1903 ...	... In Urdu. 2 a. 9 p. (1 a.)
Ditto ditto	... In Nagri. 2 a 9 p. (1 a.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	... In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto	... In Nagri. 1 a. 3 p. (1. a.)
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	... In Urdu. 1 a. (1 a)
Ditto ditto	... In Nagri. 1 a (1 a.)
Act VI of 1864 (Whipping), as modified up to 1st April, 1900	... In Urdu. 1 a. 6 p. (1 a.)
Ditto ditto	... In Nagri 1 a. 6 p. (1 a.)
Act III of 1865 (Carriers) as modified up to 31st May, 1903	... In Urdu. 9 p. (1 a).
Ditto ditto	... In Nagri. 9 p. (1 a)
Act III of 1867 (Gambling), as modified to 1st December, 1896	... In Nagri. 2 a. (1 a.)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895	... In English, Urdu, and Nagri. Bound. Rs. 3 (5 a.)
Ditto ditto	... Unbound. Rs. 2-8. (5 a)
Act VII of 1870 (Court-fees), as modified up to 1st December, 1896	... In Urdu. 8 a. 3 p. (2 a. 6 p.)
Ditto as modified up to 1st October, 1899	... In Nagri. 8 a 9 p. (1 a.)
Act I of 1871 (Cattle trespass) as modified up to 1st December, 1903	... In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto	... In Nagri. 1 a. 9 p. (1 a.)
Act XXIII of 1871 (Pensions)	... In Urdu. 9 p. (1 a.)
Ditto	... In Hindi. 9 p. (1 a.)
Act I of 1872 (Evidence), as modified up to 1st May, 1903 ...	... In Urdu. 8 a. (2 a.)
Ditto ditto ...	... In Nagri. 8 a. (2 a.)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	... In Urdu. 2 [illegible]
Act IX of 1872 (Contract), as modified up to 1st September, 1899	... In Urdu. [illegible]

Act	Price
Act IX of 1872 (Contract), as modified up to 1st September, 1899 ...	In Nagri. 9 a. 6 p. (
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ...	In Urdu. 4 a (2 a)
Ditto ditto ...	In Nagri. 4 a. (2 a.)
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	In Urdu. 9 p. (1 a)
Ditto ditto ...	In Nagri. 9 p. (1 a
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899	In Urdu. 3 a 3 p. (1
Ditto ditto ...	In Nagr. 3 a. 3 p. (
Act X of 1873 (Oaths), as modified up to 1st February, 1903	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri 1 a. (1 a
Act IX of 1875 (Majority), as modified up to 1st May, 1906	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904	In Urdu. 4 a 6 p (6 p.)
Ditto ditto ...	In Nagri. 4 a. 3 p 6 p)
Act III 1877 (Registration), as modified up to 1st December, 1896 ...	In Urdu. 4 a. 3 p. (
Ditto ditto ...	In Nagri. 4 a 6 p. (
Act I of 1878 (Opium), as modified up to 1st December, 1896 ...	In Nagri. 1 a. 6 p (
Act VII of 1878 (Forests), as modified up to 1st December 1903 ...	In Urdu. 4 a. (1 a
Ditto ditto .	In Nagri. 3 a. 9 p. (1 a
Act XI of 1878 (Arms), as modified up to 1st May, 1904	In Urdu. (2 a. (1 a.)
Ditto ditto	In Nagri. 2 a. (1 a)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902	In Urdu. 2 a (1
Ditto ditto ...	In Nagri 2 a. (1
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896	In Urdu. 2 a. 6
Ditto ditto ...	In Nagri. 2 a. (
Act XV of 1881 (Factories), as modified up to 1st April, 1891 ..	In Urdu. 1 a. 6
Ditto ditto ...	In Nagri. 1 a
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898	In Urdu. 9 a.
Ditto ditto ..	In Nagri. 9 a. (
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ...	In Urdu. 6 a. 9 p.
Ditto Ditto ...	In Nagri. 6 a. 9 p
Act VI of 1882 (Companies), as modified up to 1st August, 1906 ...	In Urdu. 13 a. 9 p. (
Ditto ditto ...	In Nagri. 14 a. (3 a
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December 1899	In Urdu. Re. 1-4. (
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	In Urdu. 1 a. (1 a.)
Ditto ditto ...	In Nagri. 1 a. (1 a.)
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ...	In Urdu. 4 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 4 a. 6 p. (1 a.
Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ...	In Urdu. 1 a. 3 p. (1 a
Ditto ditto ...	In Nagri. 1a. 3 p. (1a.)
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ...	In Urdu. 3 a. 6 p. (1 a.
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a.
Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1906	In Urdu. 6 p (1 a.)
Ditto ditto ...	In Nagri. 6 p. (1 a.)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899...	In Urdu. 2 a 6 p. (1
Act II of 1885 (Negotiable Instruments Amendment). ...	In Urdu. 9 p. (1 a).
Act III of 1885 (Transfer of Property Amendment)	In Urdu. 3 p. (1 a.)
Act X of 1885 (Oudh Estates Amendment)	In Urdu. 3 p. (1 a)
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ...	In Urdu 1 a. 6 p. (1 a.)
Act XXI of 1885 (Madras Civil Courts Amendment)	In Urdu. 3 p. (1 a.)

Act	Price
Act II of 1886 (Income tax), as modified up to 1st April, 1903	In Urdu. 3 a. (1 a. 9 p.).
Ditto ditto ...	In Nagri. 3 a. (3 a. 9 p)
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu. 3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu. 1 a. 3 p. (1 a.)
Act VII of 1886 (Registration Amendments)	In Urdu. 3 p. (1 a.)
Act X of 1886 (Criminal Law Amendment)	In Urdu. 9 p. (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act VI of 1887 (Companies Amendment)	In Urdu. 3 p. (1 a.)
Act VII of 1887 (Suits' Valuation)	In Urdu. 9 p. (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu. 2 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships)	In Urdu. 1 a. 6 p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu. 3 a. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a)
Act XV of 1887 (Burma Military Police), ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
XVIII of 1887 (Allahabad University)	In Urdu. 1 a. (1 a.)
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu 6 p. (1 a)
Ditto (as passed)	In Nagri. 6 p (1 a.)
V of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu. 3 p (1 a.)
Ditto (as passed)	In Nagri. 3 p. (1. a)
of 1888 (Inventions and Designs)	In Urdu. 2 a. 3 p. (1 a.)
Act V I of 1888 (Debtors)	In Urdu. 6 p. (1 a)
Ditto	In Nagri. 6 p (1 a.)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu. 1 a. 9 p. (1 a)
Ditto	In Nagri. 1 a. 9 p. (1 a)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	In Urdu. 6 p. (1 a)
Ditto ditto ...	In Nagri. 6 p. (1 a)
Act II of 1889 (Measures of Length)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. (1 a.)
Act VI of 1889 (Probate and Administration)	In Urdu. 6 p. (1 a)
Ditto	In Nagri 6 p. (1 a)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu. 5 a. (2 a)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri. 3 a (1 a. p)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894 ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act XVI of 1889 (Central Provinces Land Revenue) ...	In Urdu. 1 a. 6 p. (1 a.)
Ditto	In Nagri. 1 a. 6 p. (1 a.)
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu. 3 p. (1 a)
Act I of 1890 (Revenue Recovery)	In Urdu. 3 p. (1 a.)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu. 3 p. (1 a)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu. 6 p. (1 a)
Act VI of 1890 (Charitable Endowments)	In Urdu. 6 p. (1 a)
Act VIII of 1890 (Guardians and Wards)	In Urdu, 2 a. 3 p. (1 a. 9 p.)
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu. 8 a. (2 a)
Act IX of 1890 (Railways), as modified up to 1st May, 1896	In Nagri. 8 a. (2 a)

Act X o 1890 (Press and Registration of Books Amendment)	In Urdu. 3 p. (1 a)
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu. 3 p. (1 a.)
Act XVIII of 1890 (Emigration Amendment)	In Urdu. 3 p. (1 a.)
Act XIX of 1890 (Salt Amendment)	In Urdu. 3 p. (1 a.)
Act XX of 1890 (North-Western Province and Oudh)	In Urdu. 1 a. (1 a.)
Act V of 1891 (Ports Act Amendment)	In Urdu. 3 p. (1 a.)
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu. 3 p. (1 a.)
Act XIV of 1891 (Oudh Courts)	In Urdu. 6 p. (1 a.)
Act XVIII of 1891 (Bankers Books Evidence), as modified by Acts I of 1893 and XII of 1900	In Urdu 3 p. (1 a.)
Ditto ditto ...	In Nagri. 6 p. (1 a.)
Act II of 1892 (Christian Marriage Validation)	In Urdu. 3 p. (1 a)
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu. 6 p. (1. a)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ...	In Urdu. 3 p. (1 a.)
Act IV of 1893 (Partition)	In Urdu. 3 p. (1 a)
Act I of 1894 (Land Acquisition)	In Urdu. 2 a. 3 p. (1a. 6p
Ditto	In Nagri. 1 a. 6 p. (1a. 6
Act III of 1894 (Criminal Procedure and Penal Codes Amendment) ...	In Urdu. 3 p. (1 a)
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu. 3 p (1 a.)
Ditto	In Nagri. 3 p (1 a.)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ...	In Urdu. 4 a. (1 a)
Ditto ditto	In Nagri. 3 a 9 p. (2 a
Act IX of 1894 (Prisons)	In Urdu. 1 a. 3 p. (1 a
Ditto	In Nagri 2 a. 3 p. (1
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu. 3 p. (1 a)
Ditto ditto ...	In Nagri. 3 p. (1 a)
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu. 3 a. (1 a.)
Act XIV of 1895 (Pilgrim Ships)	In Urdu. 1 a. 3 p. (1 a
Act II of 1896 (Cotton-duties)	In Urdu. 1 a 3 p (1 a)
Ditto	In Nagri. 1 a (1 a)
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu. 3 p. (1 a)
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a)
Act XII of 1896 (Excise), as modified up to 1st August 1905	In Nagri 3 a. 3 p. (1 a
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p (1 a)
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu. 3 p. (1 a)
Act III of 1897 (Epidemic Diseases)	In Urdu 3p. (1 a)
Ditto	In Nagri. 3p. (1 a)
Act IV of 1897 (Fisheries)	In Urdu. 3 p (1 a)
Ditto	In Nagri. 3p. (1 a)
Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu. 3p. (1 a.)
Ditto ditto	In Nagri. 3 p (1 a)
Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu 3 p (1 a.)
Ditto ditto	In Nagri. 9 p. (1 a)
Act VIII of 1897 (Reformatory Schools)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 9 p. (1 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act X of 1897 (General Clauses)	In Urdu. 1 a. (1 a.)
Ditto	In Nagri. 1 a. (1 a)
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act XV of 1897 (Cantonments)	In Urdu. 3 p (1 a.)
Act I of 1898 [Stage-carriages Act (1861) Amendment]	In Urdu. 3 p. (1 a.)

Act I of 1898 [Stage Carriages Act (1861) Amendment]	In Nagri. 3 *p.* (1 *a.*)
Act III of 1898 (Lepers)	In Urdu. 6 *p.* (1 *a.*)
Ditto	In Nagri. 6 *p.* (1 *a.*)
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu. 3 *p.* (1 *a*)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1900	In Urdu. Re. 1-4. (8 *a.*)
Ditto ditto ...	In Hindi. Re. 1-6. (8 *a.*)
Act VI of 1898 (Post Office)	In Urdu. 2 *a.* (1 *a*)
Ditto	In Nagri. 2 *a.* (1 *a*)
Act IX of 1898 (Live-stock Importation)	In Urdu. 3 *p.* (1 *a.*)
Ditto	In Nagri. 3 *p.* (1 *a*)
Act X of 1898 (Indian Insolvency Rules)	In Urdu. 3 *p.* (1 *a*)
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu. 6 *p.* (1 *a.*)
Ditto ditto	In Nagri. 6 *p* (1 *a.*)
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu. 7 *a.* 6 *p.* (1*a.* 6*p.*)
Ditto ditto	In Nagri 7 *a.* 6 *p* (1*a.* 6*p.*)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ...	In Urdu. 2 *a.* 3 *p.* (1 *a.*)
Ditto ditto ...	In Nagri. 2 *a.* 3 *p.* (1 *a.*)
Act IV of 1899 (Government Buildings)	In Urdu. 3 *p.* (1 *a.*)
Ditto	In Nagri. 3 *p.* (1 *a.*)
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment] ...	In Urdu. 3 *p.* (1 *a*)
Ditto ditto ...	In Nagri. 3 *p.* (1 *a*)
Act VIII of 1899 (Petroleum)	In Urdu. 9 *p.* (1 *a*)
Ditto	In Nagri. 9 *p.* (1 *a.*)
Act IX of 1899 (Arbitration)	In Urdu. 9 *p.* (1 *a.*)
Ditto	In Nagri. 9 *p.* (1 *a.*)
Act XI of 1899 (Court-fees Amendment)	In Urdu. 9 *p* (1 *a.*)
Ditto	In Nagri. 6 *p.* (1 *a.*)
Act XII of 1899 (Currency Notes Forgery)	In Urdu. 3 *p.* (1 *a.*)
Ditto	In Nagri. 3 *p.* (1 *a.*)
Act XIV of 1899 (Tariff Amendment)	In Urdu. 3 *p.* (1 *a*)
Ditto	In Nagri. 3 *p.* (1 *a*)
Act XVII of 1899 (Indian Registration Amendment ...	In Urdu. 3 *p.* (1 *a.*)
Ditto ditto	In Nagri. 3 *p.* (1 *a*)
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu. 3 *p.* (1 *a*)
Ditto ditto	In Nagri. 3 *p.* (1 *a.*)
Act XX of 1899 (Presidency Banks)	In Urdu. 3 *p* (1 *a.*)
Ditto	In Nagri. 3 *p.* (1 *a.*)
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ...	In Nagri. 3 *p.* (1 *a.*)
Act XXIV of 1899 (Central Provinces Court of Wards) ..	In Urdu. 1 *a.* 3 *p.* (1 *a*)
Ditto ditto	In Nagri. 1 *a.* 3 *p.* (1 *a.*)
Act I of 1900 (Indian Articles of War Amendment)	In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ...	In Nagri. 3 *p.* (1 *a*)
Act IV of 1900 [Indian Companies (Branch Registers)]	In Urdu 3 *p.* (1 *a.*)
Ditto ditto ...	In Nagri 3 *p.* (1 *a*)
Act IX of 1900 (Amendment) of Court-fees Act, 1870) ...	In Urdu. 3 *p.* (1 *a.*)
Ditto ditto	In Nagri. 3 *p.* (1 *a*)
Act X of 1900 (Census)	In Urdu. 9 *p.* (1 *a.*)
Ditto	In Nagri. 9 *p.* (1 *a*)
Act II of 1901 [Indian Tolls (Army)]	In Urdu 6 *p* (1 *a.*)
Ditto	In Nagri. 9 *p.* (1 *a.*)
Act III of 1901 (Indian Ports)	In Urdu. 3 *p.* (1 *a*)
Act V of 1901 [Indian Forest (Amendment)]	In Urdu. 3 *p.* (1 *a.*)
Ditto	In Nagri 3 *p.* (1 *a.*)
Act VI of 1901 (Assam Labour and Emigration)	In Urdu. 8 *a.* (2 *a.*)

Act VI of 1901 (Assam Labour and Emigration)	... In Nagri. 5 *a.* (2 *a.*)
Act VII of 1901 (Native Christian Administration of Estates)	... In Urdu. 3 *p.* (1 *a.*)
Ditto ditto	... In Nagri. 3 *p* (1 *a.*)
Act VIII of 1901 (Mines)	... In Urdu. 1 *a.* (1 *a.*)
Ditto	... In Nagri. 1 *a.* (1 *a*)
Act IX of 1901	... In Urdu. 3 *p.* (1 *a.*)
Ditto	... In Nagri. 3 *p.* (1 *a.*)
Act X of 1901	... In Urdu. 3 *p.* (1 *a*)
Ditto	... In Nagri. 3 *p.* (1 *a.*)
Act II of 1902 [Cantonments (House-Accommodation)] ...	... In Urdu. 1 *a.* (1 *a.*)
Ditto ditto ...	... In Nagri. 1 *a.* (1 *a*)
Act IV of 1902 (Indian Tramways)	... In Urdu. 3 *p* (1 *a*)
Ditto	... In Nagri. 3 *p.* (1 *a.*)
Act V of 1902 (Administrators General and Official Trustees) ...	... In Urdu. 3 *p* (1 *a.*)
Ditto ditto ...	... In Nagri. 3 *p.* (1 *a.*)
Act VII of 1902 [United Provinces (Designation)] ...	... In Urdu. 3 *p.* (1 *a*)
Act VIII of 1902 (Indian Tariff)	... In Urdu. 3 *p.* (1 *a.*)
Ditto	... In Nagri. 3 *p* (1 *a*)
Act II of 1903 [Indian Post Office (Amendment)]	... In Urdu 3 *p.* (1 *a.*)
Ditto	... In Nagri. (3 *p* 1 *a*)
Act III of 1903 (Electricity)	... In Urdu. 2*a* 6*p.* (1 *a.* 6 *p*
Ditto	... In Nagri. 2*a.* 6*p.* (1 *a.* 6
Act V of 1903 (Ports)	... In Urdu. 3*p.* (1*a*) (2*a* 6
Ditto	. In Nagri. 3 *p* (1 *a.*)
Act VII of 1903 (Works of Defence)	... In Urdu. 1 *a* 3 *p.* (1 *a.*
Ditto	... In Nagri. 1 *a.* 3 *p* (1 *a*
Act VIII of 1903 (Probate and Administration)	... In Urdu. 3 *p* (1 *a.*)
Ditto	... In Nagri 1 *a* 3 *p.* (1 *a.*
Act IX of 1903 (Tea Cess)	... In Urdu. 3 *p.* (1 *a.*)
Ditto	... In Nagri. 3 *p* (1 *a.*)
Act X of 1903 (Victoria Memorial)	... In Urdu. 3 *p.* (1 *a.*)
Ditto	... In Nagri. 3 *p.* (1 *a*)
Act XIII of 1903 (Lepers)	... In Urdu. 3 *p.* (1 *a.*)
Ditto	... In Nagri 3 *p.* (1 *a.*)
Act XIV of 1903 (Indian Foreign Marriages)	... In Urdu. 3 *p.* (1 *a*)
Ditto	... In Nagri. 3 *p.* (1 *a*)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	... In Urdu. 1 *a* 9 *p.* (1 *a*)
Ditto ditto	... In Nagri. 1 *a.* 9 *p* (1 *a.*)
Act I of 1904 (Poisons)	... In Urdu. 6 *p.* (1 *a.*)
Ditto	... In Nagri. 6 *p.* (1 *a*)
Act III of 1904 (Local Authorities Loan)	... In Urdu. 3 *p* (1 *a.*)
Ditto	. In Nagri. 3 *p.* (1 *a.*)
Act IV of 1904 (North-West Border Military Police) ...	.. In Urdu. 9 *p.* (1 *a.*)
Act VI of 1904 [Transfer of Property (Amendment)] ...	... In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ...	... In Nagri. 3 *p.* (1 *a*)
Act VII of 1904 (Ancient Monuments Preservation) ...	... In Urdu. 9 *p.* (1 *a*)
Ditto ditto ...	... In Nagri. 9 *p.* (1 *a.*)
Act VIII of 1904 (Indian Universities)	... In Urdu. 1 *a.* 3 p. (1 *a.*)
Ditto	... In Nagri. 1 *a.* 3 *p.* (1 *a*)
Act X of 1904 (Co-operative Credit Societies)	... In Urdu. 1 *a.* (1 *a.*)
Ditto	... In Nagri. 1 *a* (1 *a.*)
Act XI of 1904 to revive and continue section 8 B of the Indian Tariff Act, 1894	... In Urdu. 3 *p* (1 *a.*)
Ditto Ditto	... In Nagri. 3 *p.* (1 *a.*)
Act XII of 1904 (Emigration)	... In Urdu. 3 *p.* (1 *a*)
Ditto	... In Nagri. 3 *p.* (1 *a.*)

Act XIII of 1904 (Indian Articles of War)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act I of 1905 [Local Authorities Loan (Amendment)]	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act II of 1905 [Indian Universities (Validation)]	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act III of 1905 (Indian Paper Currency)	In Urdu. 9 p. (1 a.)
Ditto	In Nagri. 9 p. (1 a.)
Act IV of 1905 (Indian Railway Board)	In Urdu. 3 p. (1 a.)
Act VI of 1905 (Court-fees (Amendment)	In Urdu. 1 a. 6 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act VII of 1905 (Bengal and Assam Laws)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
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Regulation V of 1890 (British Baluchistan Forests)	In Urdu. 2 a. (1 a. 6 p.)
Regulation VI of 1893 (Hazara Forests)	In Urdu 2 a. (1 a 6 p.)
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Regulation IX of 1896 (British Baluchistan Civil Justice)	In Urdu. 2 a. 3 p. (1 a.)
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Regulation IV of 1901 (Frontier Murderous Outrages) ...	In Urdu. 6 p. (1 a.)
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Ditto	ditto during 1902 ...	2 a. 6 p. (1 a.)
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The Baluchistan Agency Civil Justice Law, 1896 ...	In Urdu ...	2 a. 6 p. (1 a)

TABLE OF CASES REPORTED.

TABLE OF CASES CITED.

INDEX.

PAGE.

PAGE.

PAGE.

Subordinate Judge" within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure, and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

1908
March 6.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

JAGAN NATH (PLAINTIFF) v. TIRBENI SAHAI AND OTHERS (DEFENDANTS) *

Act No. XIX of 1873, (N.-W. P. Land Revenue Act), sections 132, 241—Act (Local) No. III of 1901, (United Provinces Land Revenue Act), section 223 (k)—Partition—Civil and Revenue Courts—Jurisdiction

A plaintiff came into Court upon the allegation that a certain grove had upon partition been wrongly allotted to the defendants' mahal whereas it should have been allotted to his (the plaintiff's) mahal, and he claimed a decree for a declaration of his title or for possession. *Held* that section 203 *(k)* of the United Provinces Land Revenue Act, 1901, barred the cognizance of such a suit by a Civil Court. *Kishen Prasad* v. *Kadher Mal* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgment of Banerji, J. The facts of the case sufficiently appear from the judgment under appeal which was as follows:—

BANERJI, J.—The facts of this case are these—The village Alipur was by an imperfect partition made in 1881 divided into 32 pattis. On the 5th of August 1892, Hira Lal, a co-sharer in the village, applied to the Revenue Court for perfect partition and prayed that certain pattis which belonged to him should be formed into a separate mahal. The defendants Tirbeni Sahai, Gomti Sahai and Musammat Suraj Kunwar, who were named as opposite parties to the application of Hira Lal, made an application on the 15th of December 1892 in which they asked that their pattis

*Appeal No. 82 of 1907 under section 10 of the Letters Patent.

(1) Weekly Notes, 1900, p. 11.

1908

JAGAN NATH v. TIRBENI SAHAI.

also should be formed into a separate mahal. On the 18th of August 1893 a partition proceeding was drawn up to the effect that 20 pattis should be formed into different mahals and 12 pattis, one of which was patti No. 32, should form a separate mahal to be called the mahal of the *non-applicants for partition.* Accordingly a partition was effected, which has been confirmed by the Collector. By this partition the village was divided into 26 mahals, the 26th mahal being that of the non-applicants for partition. The pattis of Tirbeni Sahai and others were included in mahal Hira Lal. In patti No. 32, which is the patti of the plaintiff and which was included in the 26th mahal, the mahal of the non-applicants for partition, there is a grove No. 623. This grove was allotted to the mahal in which the defendants are co-sharers. The plaintiff states that he has a half share in the grove, that the defendants have no right to that half share and that the inclusion of the whole of the grove in the defendants' share was improper. The plaintiff accordingly brought the present suit for a declaration of his right to a half share of the grove No. 623 and in the alternative for possession of that share. The court of first instance dismissed the suit as barred by the provisions of section 233, clause *(k)* of the Land Revenue Act (No. III of 1901). The lower appellate Court has set aside the decree of that Court and has decreed the plaintiff's claim. That Court was of opinion that as under the partition proceeding patti No. 32 was excluded from partition, the revenue authorities had no jurisdiction to include the grove in suit, which appertained to the said patti, in the mahal of the defendants. The learned Judge relies upon the decision of this Court in *Kishen Prasad* v. *Kadher Mal* (1). That case is clearly distinguishable from the present. What happened in that case was that under a previous partition of the land of the village four mahals had been formed, one of which was called *patti shamilat.* Subsequently a partition of *patti shamilat* alone took place and certain land which appertained to one of the other three mahal was p[illegible]tioned. It was held that this partition did not prec[illegible] Court from determining the plaintiff's right to a[illegible] which was not the subject of the partition of[illegible]

(1) Weekly Notes, 1900, p. 11.

shamilat. In the present case the whole of the village was under partition. The revenue authorities directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants for partition, was to consist of 12 pattis. If land which appertained to one of these 12 pattis was allotted to another of the mahals under the partition, that was a matter relating to partition and ought to have formed the subject of an appeal under section 132 of Act No. XIX of 1873, which was the Act under which the partition in question was effected. Rightly or wrongly, the revenue authorities allotted to the defendants' mahal what the plaintiff says ought to have been allotted to his mahal, namely, the mahal of the non-applicants for partition. This was clearly a question relating to the partition or union of mahals within the meaning of clause *(k)*, section 233 of Act No. III of 1901 and was therefore not cognizable by a Civil Court. The plaintiff mistook his remedy, and, instead of appealing against the order confirming the partition, he brought the present suit in a Civil Court. Such a suit falls within the prohibition of section 233 *(k)* and is not maintainable. The Court of first instance was in my judgment right. I accordingly allow the appeal, set aside the decree of the court below and restore that of the Court of first instance with costs in all Courts.

Against this judgment the plaintiff appealed.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C. J., and BURKITT, J.—We agree in the view taken by the learned Judge of this Court from whom this appeal has been preferred, and dismiss the appeal with costs.

1908
November 3.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KEDAR SINGH AND OTHERS (PLAINTIFFS) *v.* MATABADAL SINGH AND OTHERS (DEFENDANTS.)*

Act No. VII of 1887 (Suits Valuation Act), section 8—Act No. VII of 1870 (Court Fees Act), section 7, clause ix—Valuation of suit—Suit for redemption of mortgage.

Held that the value for purposes of jurisdiction of a suit for redemption of mortgage is the amount of the principal mortgage money and not the value of the property mortgaged. *Kubair Singh* v *Atma Ram* (1) and *Amanat Begam* v. *Bhajan Lal* (2) followed. The law as laid down in these cases has not been affected by the passing of Act No VII of 1887, section 8.

THIS was a suit for redemption of mortgage. The amount secured by the mortgage was Rs. 1,000, but the value of the property mortgaged was said to be Rs. 9,000. The suit was filed in the Court of the Subordinate Judge, who directed the plaint to be returned for presentation in the proper court upon the ground that the suit was within the jurisdiction of the Munsif. Against this order the plaintiff appealed to the High Court. At the hearing a preliminary objection was taken on behalf of the respondents that the valuation of the suit was rightly decided by the Subordinate Judge, and, such being the case, an appeal lay to the District Judge and not to the High Court.

Munshi *Gokul Prasad*, for the appellants.

Mr. *W. Wallach*, for the respondents.

AIKMAN and KARAMAT HUSAIN, JJ.—This is an appeal from an order of the learned Subordinate Judge of Jaunpur returning a plaint to the appellants for presentation in the Court of the Munsif. The suit was one for redemption of a mortgage, the amount secured by the mortgage being Rs. 1,000. In the plaint it is stated that the value of the property is Rs. 9,000. The learned counsel for the respondents takes a preliminary objection based on section 589 of the Code of Civil Procedure, *viz.*, that the appeal does not lie to this Court, but to the Court of the District Judge. This preliminary objection really raises the issue as to whether the plaintiffs' suit was cognizable by the Munsif or by the Subordinate Judge. If the "value" of the suit is to be taken to be the amount secured by the mortgage, then, under

* First Appeal No 34 of 1908, from an order of Tajammul Husain, Subordinate Judge of Jaunpur, dated the 2nd of July 1907.

(1) (1883) I. L. R., 5 All., 332. (2) (1886) I. L. R., 8 All., 438.

section 19 (1) of Act No. XII of 1887, the plaint should have been filed in the Court of the Munsif and the action taken by the Subordinate Judge in returning it is right. In the case of *Kubair Singh* v. *Atma Ram* it (1) was held by Stuart, C.J., and Tyrrell, J., that the value of the subject-matter of a suit like the present was not the market value of the land, but the amount of the mortgage money. In the Full Bench case of *Amanat Begam* v. *Bhajan Lal* (2) a similar view was taken. The learned vakil for the appellants contends that, having regard to the provisions of section 8 of Act No. VII of 1887, an Act which was passed after the rulings referred to, those rulings are no longer law. That section provides that in suits other than those referred to in the Court Fees Act, section 7, paragraph ix, where court fees are payable *ad valorem* under the Court Fees Act, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. One of the kinds of suits referred to in paragraph ix of section 7 is a suit against a mortgagee for the property mortgaged. The present suit is one of that nature. But the section of the Suits' Valuation Act relied on by the appellants' learned vakil does not prescribe what is to be taken as the value of a suit for redemption. This being so, we think that the section relied on does not affect the rulings to which we have referred above. We must therefore sustain the preliminary objection. We direct that the memorandum of appeal be returned to the appellants for presentation in the proper Court. The respondents are entitled to their costs in this Court.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.

1908
November 27.

JAGAR NATH SINGH AND ANOTHER (PLAINTIFFS) v. SHEO GHULAM SINGH (DEFENDANT).*

Civil Procedure Code, section 244—Execution of decree—Jurisdiction of Court executing a decree—Suit by representatives of mortgagor judgment-debtor for declaration of invalidity of mortgage.

Held that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings

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* Second Appeal No 1102 of 1907 from a decree of E. F. Oppenheim, District Judge, of Gorakhpur, dated the 29th of May 1907, reversing a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 31st of January 1907.

(1) (1883) I L. R., 5 All, 332. (2) (1885) I. L. R. 8 All, 438.

1908

JAGAR NATH SINGH
v.
SHEO GHULAM SINGH.

as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been made. A separate suit therefore, on the part of such persons seeking a declaration that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of section 244 of the Code of Civil Procedure. *Lalidhar* v. *Chaturbhuj* (1) followed.

THE facts of this case are as follows:

One Musammat Raghubansa, a Hindu window, executed a mortgage in favour of Sheo Ghulam Singh. The mortgagee obtained a decree for sale on that mortgage on the 1st of April 1905. Thereafter the mortgagor died, and Jagar Nath Singh and others were brought upon the record of the execution proceedings as the reversionary heirs of the last full owner the husband of the mortgagor. The reversioners filed an objection to the sale upon the ground that the mortgage was executed by Musammat Raghubansa without legal necessity. Their objection was disallowed, and they then filed a suit for a declaration that the mortgaged property was not liable to be sold in execution of the mortgagee's decree. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim; but on appeal by the defendants the suit was dismissed by the District Judge as being barred by the provisions of section 244 of the Code of Civil Procedure. The plaintiffs thereupon appealed to the High Court.

Munshi *Iswar Saran* and Babu *Jogul Kishor*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the respondent.

STANLEY, C.J., and BANERJI, J.—*This appeal arises out of* a suit for a declaration that a share of certain zamindari property was not liable to be sold in execution of a decree obtained against a Hindu widow on foot of a mortgage executed by her. Musammat Raghubansa executed a mortgage in favour of the defendant Sheo Ghulam Singh and on foot of that mortgage Sheo Ghulam Singh obtained a decree for sale on t[illegible] 1st of April 1905. After this date Musammat Raghubansa
upon the appellants, who claimed to b

(1) (1889) I. L. R., 21 A[illegible]

deceased owner, the husband of Musammat Raghubansa, were brought upon the record as the representatives of Musammat Raghubansa on an application under section 89 of the Transfer of Property Act for an order absolute. They filed an objection to the sale on the ground that the mortgage was executed by Musammat Raghubansa without legal necessity. Their objection was disallowed, and thereupon the suit out of which this appeal has arisen was filed for a declaration that the property was not liable to be sold in execution of the mortgage decree. The Court of first instance decreed their claim, but upon appeal the lower appellate Court reversed the decision of the Court below and dismissed the plaintiffs' suit, on the ground that it was barred by the provisions of section 244 of the Code of Civil Procedure. The learned advocate for the respondent admits that this section does not apply and that the learned District Judge was wrong in the view taken by him. The case is on all fours with that of *Liladhar* v. *Chaturbhuj* (1). In that case it was held by one of us and by Aikman, J., that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. In view of this decision the learned District Judge was clearly wrong. We therefore allow the appeal, set aside the decree of the lower appellate Court, and, as the appeal was decided upon a preliminary point, we remand the case under section 562 of the Code to that Court, with directions that it be reinstated in the file of pending appeals and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1889) I. L. R., 21 All., 277.

1908
November 27.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.
KANHAI LAL AND ANOTHER (OPPOSITE PARTY) *v.* CHHADAMMI LAL (APPLICANT).*

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal.

Held that when sanction to prosecute has been granted by a Court under the provisions of section 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. *Salig Ram* v. *Ramji Lal* (1), *Emperor* v. *Serh Mal* (2) and *Muthuswami Mudali* v. *Veeni Chetti* (3) referred to.

IN this case one Chhadammi Lal applied in the Court of the Munsif of Bareilly for sanction to prosecute Kanhai Lal and another for an offence punishable under section 193 of the Indian Penal Code. Their application was refused, upon which a further application was made to the District Judge who granted the sanction prayed for. The persons against whom the sanction had been granted thereupon applied to the High Court in its revisional criminal jurisdiction against the order of the District Judge.

Babu *Satya Chandra Mukerji*, for the applicants.

Babu *Sital Prasad Ghosh*, for the opposite party.

AIKMAN and KARAMAT HUSAIN, JJ.—One Chhadammi Lal applied to the Munsif for sanction to prosecute the present applicants for an offence punishable under section 193, Indian Penal Code. Sanction was refused by the Munsif. Chhadammi Lal then applied to the learned District Judge, who granted the sanction. The applicants have presented a petition which is headed as a "Criminal Revision" against the order of the District Judge. It may be taken as decided by the Full Bench in *Salig Ram* v. *Ramji Lal* (1) that this Court has no revisional powers on the criminal side to interfere with an order passed by a Civil Court granting sanction under the provisions of section 195, Code of Criminal Procedure. We are bound by that ruling, and must therefore hold that we have no power of interference in revision. But it is contended that apart from the revisional powers conferred on this Court by Chapter XXXII of the Code of

*Criminal Revision No. 656 of 1908, from an order of W. H. Webb, Esq., District Judge of Bareilly, dated the 17th of July 1908.

(1) (1906) I. L. R., 28 All., 554. (2) Weekly Notes, 1908, p. 102.
(3) (1907) I. L. R., 30 Mad., 382.

Criminal Procedure, we have power under section 195, clause (6) of that Code to revoke the sanction which the learned District Judge has given. In the case of *Muthuswami Mudali* v. *Veeni Chetti* (1) Mr. Justice Wallis expressed his opinion that it was never intended by section 195 that there should be more than one appeal in a case like the present. In the case of *King Emperor* v. *Serh Mal* (2) we expressed our concurrence with what was said by Wallis, J., in the case referred to. We see no reason to alter our opinion. We therefore hold that we have no power of interference in this case, and reject the application.

1908

KANHAI LAL v. CHHADAMMI LAL.

APPELLATE CIVIL.

1908 *November* 28.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji

SAGAR MAL (DEFENDANT) v. MAKHAN LAL AND OTHERS (PLAINTIFFS).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 4, 5), 32 (2)—*Rent free grant*—"*Holding*"—"*Tenant*"

Held that a rent free grant is not a "holding" nor is the grantee a "tenant" within the meaning of the Agra Tenancy Act, 1901. *Abdul Karim* v. *Ramzan* (3) approved

THE plaintiff in this case brought his suit in a Civil Court for partition of a rent-free holding. The Court of first instance (Munsif of Meerut) gave the plaintiff a decree, and this decree was in appeal confirmed by the Additional Judge. One of the defendants, Sagar Mal, appealed from this decree to the High Court, upon the ground that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition.

Pandit *M. L. Sandal*, for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

STANLEY, C.J. and BANERJI, J.—This appeal arises in a suit for partition of a rent free holding Both the Courts below granted the plaintiff a decree. This appeal has been preferred by one of the defendants, Sagar Mal, and the only ground of appeal pressed

* Second Appeal No. 1284 of 1907 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut dated the 31st of May 1907, confirming a decree of Hari Mohan Banerji, Munsif of Meerut, dated the 12th of January 1907.

(1) (1907) I. L. R., 30 Mad., 282. (2) Weekly Notes, 1908, p. 102.
(3) Weekly Notes, 1908, p. 197.

1908

SAGAR MAL
v.
MAKHAN LAL.

before us is that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition. We are of opinion that this section does not apply to a rent free grantee. The section in question falls within Chapter II, which deals with "the devolution, transfer and division of tenancies." A tenant is defined in section 4, clause (5), and does not include a rent free grantee. A rent free grantee, as also a mortgagee of proprietary rights, is by that definition expressly excluded. Consequently a rent free grant does not appear to us to be a "holding" within the meaning of section 32. The word "holding" in that section means, we think, the holding of a tenant as defined by the Act. We may point out that the heading of section 32 is :—"Division of tenancies," that is the division of the holdings of tenants as defined in section 4. We may also point out that Chapter X of the Act deals with the resumption of rent free grants. A separate Chapter in the Act is devoted to these grants This view was expressed by our brother Richards in the case of *Abdul Karim* v. *Ramzan* (1). Our learned brother, after referring at length to some of the sections of the Agra Tenancy Act, held that a suit for partition of land alleged to be rent free is not excluded from the jurisdiction of the Civil Court either by section 233 (*k*) of the Land Revenue Act or by section 32 of the Agra Tenancy Act. We therefore agree in the view expressed by both the Courts below and dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1908, p. 107.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

1908
November 30.

AYUB ALI KHAN (DEFENDANT) *v.* MASHUQ ALI KHAN (PLAINTIFF).*

Act No. XII of 1881 (North-Western Provinces Rent Act), section 9—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 22, 32 (2)—Occupancy holding—Succession—Suit for right to a share in an occupancy holding—Civil and Revenue Courts—Jurisdiction.

Held that a suit in a Civil Court for a declaration of the plaintiff's right to a share in an occupancy holding is not precluded by section 32 (2) of the Agra Tenancy Act.

Held also that there was nothing in the Rent Act of 1881 to prevent a woman becoming an occupancy tenant, and if she did so, on her death the tenancy would pass to her heirs and not the heirs of her husband.

THE facts out of which this appeal arose were as follows:—

An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the name of his widow, Musammat Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902, after the new Tenancy Act came into force. Upon her death her step brother Mashuq Ali Khan endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the entire holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon Mashuq Ali Khan brought the present suit in the Civil Court for a declaration of his right to a moiety of the holding, for joint possession thereof and also for damages. The Court of first instance (Munsif of Bulandshahr) threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge of Aligarh held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the defendant Ayub Ali Khan appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the

* First Appeal No. 44 of 1908 from an order of Khettar Mohan Ghose, Additional Judge of Aligarh, dated the 8th of January 1908.

1908

Ayub Ali Khan v. Mashuq Ali Khan.

name of his widow, Mussammat Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902 after the new Tenancy Act came into force. Upon her death her step-brother Mashuq Ali Khan, plaintiff respondent, endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the whole holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon the plaintiff Mashuq Ali Khan brought a suit in the Civil Court for declaration of his right to a moiety of the holding, for joint possession thereof, and also for damages. The Court of first instance threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the present appeal has been preferred. Two pleas have been urged before us. One is that the suit is obnoxious to the provisions of section 32 (2) of the Agra Tenancy Act, which prohibits any suit for the division of a holding or distribution of the rent thereof being entertained by a Civil or Revenue Court. In our opinion this plea cannot prevail. If, having got his declaration, the plaintiff attempted to sue for actual division of the holding or distribution of the rent he might be met by this section. We do not think that this section prohibits a suit like the present. It was next urged that, having regard to the provisions of section 22 of the Act which provides for succession to tenancies, the plaintiff does not possess the right which he sets up. The decision of this plea is more difficult. After giving the point our best consideration, we are of opinion that under the circumstances of the case the plaintiff has the right of succession under section 22 of the Act. The plaintiff's sister succeeded under the former Act No. XII of 1881. Under section 9 of that Act the occupancy right devolved to her "as if it were land." She being a Muhammadan widow acquired in our opinion an absolute right to be considered an occupancy tenant. Succession to her occupancy right is governed by section 22 of the new Act. It is true that that section is worded as if males alone can be exproprietary, occupancy or non-occupancy tenants, but we can find nothing in the other provisions of the Act which would prevent a woman

acquiring such rights. There is nothing to prevent a woman being a tenant of agricultural land, and if she held it continuously for 12 years she would acquire a right of occupancy just as a man would. We cannot therefore attach to the fact that the words in section 22 are words importing only the masculine gender the weight which is sought to be placed upon them. We think that Musammat Rasul-un-nissa having been an occupancy tenant, her half brother, who, it is not denied, was the son of the same father, is entitled to succeed under clause (*c*) of the section. The same question was very fully considered by the members of the Board of Revenue in *Ikramuddin* v. *Irshad Ali* (1). There it was held that a Muhammadan widow who succeeded to an occupancy holding acquired an absolute estate, and that on her death, after the 1st of January 1902, the persons to succeed will be her heirs and not the heirs of her deceased husband. We agree in this view. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1908
December 1.

Before Mr Justice Richards and Mr Justice Griffin

JAGAN NATH (PLAINTIFF) *v.* DIBBO AND OTHERS (DEFENDANTS)*

Act No. IV of 1882 (Transfer of Property Act), section 6—Hindu Law—Transfer by a Hindu reversioner of his reversionary interest.

Held that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. *Sham Sunder Lal* v. *Achhan Kunwar* (2) followed.

ON the 6th of September 1884, Tota Ram and Har Sukh, who then had a reversionary interest in certain property expectant on the death of a Hindu widow, Musammat Shitabo, executed a mortgage thereof in favour of one Jagan Nath. Musammat Shitabo was in possession, and her name was recorded in the revenue papers. The mortgage deed was registered and from the registration endorsement it appeared that the mortgagors appeared before the Sub Registrar, acknowledged the deed and admitted receipt of the mortgage money. Musammat Shitabo died on the 5th October 1888. On the 18th of January 1906

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* First Appeal No 190 of 1906 from a decree of Kunwar Bahadur, Subordinate Judge of Shahjahanpur, dated the 18th April of 1906.

(1) Sel. Dec. Board of Revenue No. 2 of 1905. (2) (1898) L. R., 25 I. A., 183.

1908

JAGAN NATH v. DIBBO.

the mortgagee instituted the present suit against various transferees both from Musammat Shitabo and the mortgagors to enforce his mortgage. The Court of first instance (Subordinate Judge of Shahjahanpur) found that no consideration for the mortgage had actually passed, but that the mortgage was executed in order that the mortgagee might carry on litigation on behalf of the mortgagors against the widow. That Court therefore dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Maulvi *Muhammad Ishaq* and Babu *Durga Charan Banerji*, for the respondents.

RICHARDS AND GRIFFIN, JJ.—This was a suit to enforce a mortgage dated the 6th of September 1884. The defence was that the mortgage was without consideration, that the mortgagors had no power to mortgage the property and that the suit was barred by limitation. The admitted facts are that at the date of the mortgage one Musammat Shitabo was in possession as a Hindu widow, having succeeded her husband, one Bhola, who died childless. A number of transfers have since been made. Some of the defendants are the transferees of Musammat Shitabo and some are transferees of Tota Ram and Har Sukh the mortgagors named in the mortgage deed. The mortgage deed bears interest at the rate of 37½ per cent. per annum. Musammat Shitabo died on the 5th of October 1888, and no proceedings were taken until the institution of the present suit on the 18th of January 1906. The Court below has found that the deed was fictitious and that no consideration passed. The mortgage deed was registered, and it appears from the endorsement of the Registrar that the mortgagors appeared before him, ackowledged the deed and admitted receipt of the mortgage money. The money was not paid before the Sub-Registrar, and Jagan Nath, the mortgagee, produces no receipt. The defendants' witnesses depose that Tota Ram and Har Sukh were very poor persons and that they entered into an arrangement with Jagan Nath that Jagan Nath should carry on litigation for them, and in the event of its being successful, the property was to be shared and that as part of this arrangement the mortgage in suit was

executed; that the Rs. 2,000 was never paid, and that Jagan Nath did not carry on the litigation. That there was litigation going on at that time is very clear, and the nature of the litigation appears. It was a suit by Har Sukh and Tota Ram to set aside alienations made by Musammat Shitabo on the ground that she as Hindu widow had no right to alienate the property she had succeeded to as widow of Bhola. It further appears that Shitabo was entered as the owner at this very time in the public *khewat*. We see no reason to differ from the finding of the learned Subordinate Judge that there was no consideration for the mortgage. Jagan Nath years ago instituted a suit on another bond executed by Har Sukh in his favour without any mention of the present bond, though the latter was for a much larger amount. It has been held by the Privy Council in the case of *Sham Sunder Lal* v. *Achhan Kunwar* (1) that it is not competent for a Hindu reversioner to transfer his reversionary interest expectant on the death of Hindu widow. See also the case of *Nand Kishore Lal* v. *Kanee Ram Tewary* (2). It is, however, contended on behalf of the plaintiff that he can call to his aid the provisions of section 43 of the Transfer of the Property Act, 1882, which provides that "where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." This section, of course, cannot apply if the deed was really without consideration, but even if there was some consideration for the deed, it would be necessary for the plaintiff to show that there was an erroneous representation by Har Sukh and Tota Ram that they were in possession of the property at the date of the mortgage. Jagan Nath when examined did not attempt to show that he did not know that Musammat Shitabo was in possession as a Hindu widow, or that there was any representation to him which made him think that Har Sukh and Tota Ram were in possession of the estate. On the other hand he says that he was told that money was wanted for litigation, and we know from the evidence on the record that the nature of this litigation was to set aside

(1) (1898) L. R., 25 I. A., 183. (2) (1902) I. L. R., 29 Calc., 355.

1908

JAGAN NATH v. DIBBO.

alienations by Musammat Shitabo, and that Musammat Shitabo was alive and was a party to the litigation. Both these grounds are fatal to the plaintiff's case. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1908
December 1

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KANDHYA LAL (APPLICANT) v. MANKI (OPPOSITE PARTY.)*

Act No. V of 1881 *(Probate and Administration Act), section* 78 – *Act No. IX of* 1872 *(Indian Contract Act), section* 129—*Administration—Surety —Continuing guarantee.*

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, his is not a continuing guarantee within the meaning of section 129 of the Indian Contract Act, 1872. Such a surety cannot of his own free will withdraw from his suretyship *Subroya Chetty* v *Rugammal* (1) followed *Raj Narain Mookerjee* v. *Ful Kumari Debi* (2) dissented from.

IN this case letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Musammat Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate One Kandhya Lal became surety Less than six months afterwards Kandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Musammat Manki to provide a fresh surety. The District Judge rejected this application. The surety thereupon appealed to the High Court.

Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—The respondent Musammat Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Kandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammat Manki

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* First Appeal No. 64 of 1908 from an order of G A. Paterson, District Judge of Benares, dated the 30th of March 1908.

(1) (1905) I. L. R., 28 Mad., 161. (2) (1902) I. L. R., 29 Calc., 68.

to furnish a fresh surety. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a surety bond given under the circumstances stated can be cancelled—see *Raj Narain Mookerjee v. Ful Kumari Debi* [1] and *Subroya Chetty v. Ragammal* [2]. The former Court held that a surety bond given under the circumstances stated is a continuing guarantee within the meaning of section 129 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administratrix had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says:—"I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged." If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammat Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) I. L. R., 29 Calc., 68 (2) (1905) I. L. R., 28 Mad., 161.

1908

JAGAN NATH v. DIBBO.

alienations by Musammat Shitabo, and that Musammat Shitabo was alive and was a party to the litigation. Both these grounds are fatal to the plaintiff's case. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1908
December 1

Before Mr Justice Aikman and Mr Justice Karamat Husain.

KANDHYA LAL (APPLICANT) v. MANKI (OPPOSITE PARTY.)*

Act No. V of 1881 (*Probate and Administration Act*), *section* 78–*Act No. IX of* 1872 (*Indian Contract Act*), *section* 129—*Administration—Surety—Continuing guarantee.*

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, his is not a continuing guarantee within the meaning of section 129 of the Indian Contract Act, 1872. Such a surety cannot of his own free will withdraw from his suretyship *Subroya Chetty* v. *Rajammal* (1) followed. *Raj Narain Mookerjee* v. *Ful Kumari Debi* (2) dissented from

IN this case letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Musammat Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate One Kandhya Lal became surety Less than six months afterwards Kandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Musammat Manki to provide a fresh surety. The District Judge rejected this application. The surety thereupon appealed to the High Court.

Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—The respondent Musammat Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Kandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammat Manki

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* First Appeal No. 64 of 1908 from an order of G. A. Paterson, District Judge of Benares, dated the 30th of March 1908.

(1) (1905) I. L. R., 28 Mad., 161. (2) (1902) I. L. R., 29 Calc., 68.

to furnish a fresh surety. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a surety bond given under the circumstances stated can be cancelled—see *Raj Narain Mookerjee v. Ful Kumari Debi* (1) and *Subbaraya Chetty v. Rajammal* (2). The former Court held that a surety bond given under the circumstances stated is a continuing guarantee within the meaning of section 129 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administratrix had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says:—"I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged." If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammat Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1903) I. L. R., 29 Calc., 68. (2) (1905) I. L. R., 2[illegible]

MISCELLANEOUS CIVIL.

1908
December 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji

CHOGA LAL (PLAINTIFF) *v.* PIYARI AND ANOTHER (DEFENDANTS).*

Act No IX of 1872 (Indian Contract Act), section 23—Contract—Agreement immoral or opposed to public policy—Lease of house to a prostitute

Held that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy; and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a court of law.

A SUIT for arrears of rent of two huts (Nos 307 and 309, Sudder Bazar, Jhansi), rented jointly from the plaintiff by two prostitutes, Piyari and Kallo, was brought in the Court of the Cantonment Magistrate of Jhansi exercising powers of a Court of Small Causes. The defendants pleaded that recovery of rent was barred, inasmuch as to the plaintiff's knowledge the huts were rented by the defendants for immoral purposes, and reference was made to the case of *Gowreenath Mookerjee* v. *Madhomonee Peshakur* (1). The Court referred the case to the High Court under the provisions of section 617 of the Code of Civil Procedure.

Babu *Harendra Krishna Mukerji*, for the plaintiff.

Lala *Girdhari Lal Agarwala*, for the defendants.

STANLEY C.J., and BANERJI, J.—This is a reference made by the learned Cantonment Magistrate of Jhansi exercising the powers of a Judge of a Court of Small Causes, under section 617 of the Code of Civil Procedure. The question which he submits for the opinion of the Court is whether the English law is operative in a suit to recover rent due for a residence or quarters rented to a prostitute, with knowledge that such residence or quarters would be used by her to carry on her immoral trade and profession. It seems to us unnecessary to determine whether the English law is applicable in this country, because we find that there is an express provision of the Indian Contract Act under which a contract for such a purpose would be illegal. Section 23 of that Act provides that the consideration or object of an agreement is lawful, unless,

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*Miscellaneous No. 271 of 1908.

(1) (1892) 18 W. R., 445.

amongst other things, the Court regards it as immoral or opposed to public policy. If the object of an agreement is immoral or opposed to public policy, clearly the agreement cannot be enforced. It cannot be denied that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy, and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. This is the answer which we give to the reference.

1908

Chota Lal v. Piyari.

REVISIONAL CIVIL.

1908
December 5.

Before Mr. Justice Aikman, and Mr. Justice Karamat Husain.

IN THE MATTER OF THE PETITION OF KEDAR NATH.*

Act No. XVIII of 1879 (Legal Practitioners Act), section 36—Order declaring certain persons to be touts—Revision—Jurisdiction—Practice—Statute 24 and 25 Vict., Cap. CIV, section 15—Rules of High Court of the 18th January, 1898, rules 1 (xiii) and 4.

The District Judge of Meerut held an inquiry under section 36 of the Legal Practitioners Act, 1879, as the result of which he ordered certain persons to be proclaimed to be touts and excluded from the precincts of the courts in the judicial division. The parties affected applied to the High Court against the Judge's order under section 15 of Statute 24 and 25 Vict., Cap CIV. On this application being laid before a division Bench for disposal it was *held*:—

Per KARAMAT HUSAIN, J., that the disciplinary powers of the High Court under section 15 of the Statute being exercisable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application neither had a single Judge jurisdiction to admit it.

Per AIKMAN, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, and rule 1 (xiii) of the Rules of Court of the 18th January 1898 effected such a delegation. But the powers of the Court under section 15 of the Statute were limited, and in this instance no case for their exercise had been shown. *Tej Ram v. Har Sukh* (1) and *Muhammad Suleman Khan v. Fatima* (2) referred to.

IN this case the District Judge of Meerut had taken proceedings under section 36 of the Legal Practitioners' Act against certain persons alleged to be touts, and by an order dated the 15th

* Civil Revision No. 50 of 1908, from an order of L. Stuart, Esq., District Judge, Meerut, dated the 15th of June 1908.

(1) (1875) I. L. R., 1 All., 101. (2) (1886) I. L. R., 9 All., 104.

1908

In the matter of the petition of Kedar Nath.

June 1908 had directed that a list should be prepared of the names of eleven persons who were found to be touts and hung up in his own Court and in all Courts subordinate to his, including the rent courts. Against this order Kedar Nath, one of the persons affected thereby, applied to the High Court under section 15 of the Charter Act.

Mr. *E. A. Howard*, (with whom Mr. *R. K. Sorabji* and Babu *Parbati Charan Chatterji*) for the applicant, argued that the procedure of the District Judge was defective in that the evidence against the alleged touts was taken behind their backs. It was not sufficient that the evidence was shown to the persons affected thereby; they should have been allowed to cross-examine the witnesses against them.

It was also argued that under the Charter Act the powers given by section 15 were exercisable only by the whole Court and not by a bench of two Judges, and the cases of *In the matter of Kase Bahadur* (1) and *Lal Singh* v. *Ghansham Singh* (2) were referred to as to the practice of the Court.

It was further contended that at any rate the order could have no application to Revenue Courts, which were not subordinate to the District Judge.

The Government Advocate (Mr. *W. Wallach*), in support of the Judge's order pointed out that the Judge's procedure had been in accordance with that adopted by the High Court in the case of *Kase Bahadur* (1). He had acted in a regular manner and made an exhaustive enquiry and the applicant had been given an opportunity to cross-examine the witnesses.

As to the question of the jurisdiction of the Bench, that he submitted, was covered by the rules of Court, rules 1 (xiii) and 4 of which gave power to a Division Bench to hear cases of the nature of the present. If, however, it was necessary that the powers given by section 15 of the Charter Act must be exercised by the whole Court, then the application was not yet before the Court at all, a single Judge having no power to admit it.

As to whether the District Judge's order could apply to Rent Courts, it was argued that in several matters the Collector was subordinate to the District Judge, though in others he was

(1) Weekly Notes, 1904, p. 162. (2) Weekly Notes, 1897, p. 173.

amongst other things, the Court regards it as immoral or opposed to public policy. If the object of an agreement is immoral or opposed to public policy, clearly the agreement cannot be enforced. It cannot be denied that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy, and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. This is the answer which we give to the reference.

REVISIONAL CIVIL.

1909
December 5.

Before Mr. Justice Aikman, and Mr Justice Karamat Husain.
IN THE MATTER OF THE PETITION OF KEDAR NATH.*

Act No. XVIII of 1879 (Legal Practitioners Act), section 36—Order declaring certain persons to be touts—Revision—Jurisdiction—Practice—Statute 24 and 25 Vict, Cap CIV, section 15—Rules of High Court of the 18th January, 1898, rules 1 (xiii) and 4.

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1908

IN THE MATTER OF THE PETITION OF KEDAR NATH.

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Mr. *E. A. Howard*, (with whom Mr. *R. K. Sorabji* and Babu *Parbati Charan Chatterji*) for the applicant, argued that the procedure of the District Judge was defective in that the evidence against the alleged touts was taken behind their backs. It was not sufficient that the evidence was shown to the persons affected thereby: they should have been allowed to cross-examine the witnesses against them.

It was also argued that under the Charter Act the powers given by section 15 were exerciseable only by the whole Court and not by a bench of two Judges, and the cases of *In the matter of Kuar Bahadur* (1) and *Lal Singh* v. *Ghansham Singh* (2) were referred to as to the practice of the Court.

It was further contended that at any rate the order could have no application to Revenue Courts, which were not subordinate to the District Judge.

The Government Advocate (Mr. *W. Wallach*), in support of the Judge's order pointed out that the Judge's procedure had been in accordance with that adopted by the High Court in the case of *Kuar Bahadur* (1). He had acted in a regular manner and made an exhaustive enquiry and the applicant had been given an opportunity to cross examine the witnesses.

As to the question of the jurisdiction of the Bench, that he submitted, was covered by the rules of Court, rules 1 (xiii) and 4 of which gave power to a Division Bench to hear cases of the nature of the present. If, however, it was necessary that the powers given by section 15 of the Charter Act must be exercised by the whole Court, then the application was not yet before the Court at all, a single Judge having no power to admit it.

As to whether the District Judge's order could apply to Rent Courts, it was argued that in several matters the Collector was subordinate to the District Judge, though in others he was

(1) Weekly Notes, 1896, p. 107. (2) Weekly Notes, 1897, p. 179.

not; but the language of section 36 of the Legal Practitioners' Act was wide enough to include the Rent Courts. In any case the Collector and District Magistrate were the same, and it made no practical difference whether the applicant was excluded from a particular place as the District Magistrate's Court or as the Collector's.

KARAMAT HUSAIN, J.—The learned District Judge of Meerut acting under section 36 of the Legal Practitioners' Act, (Act No. XVIII of 1879) by his order, dated the 15th June 1908, framed a list containing the names of 11 persons who by the evidence of general repute were proved to his satisfaction to habitually act as touts, and directed it to be hung in his own Court and in all Courts subordinate to him, including the rent Courts. The appellant Kedar Nath is one of the persons whose name is on that list. He has applied for the revision of that order of the learned District Judge. There is no appeal from such an order, nor is there any revision, either under section 439 of the Code of Criminal Procedure or section 622 of the Code of Civil Procedure. The only section under which the High Court has been held entitled to interfere with an order passed under section 36 of the Legal Practitioners' Act is section 15 of the High Courts Act, 24 and 25 Vict., Cap. 104. In the application for revision there is no ground to the effect that section 15 of the High Courts Act gives the power of superintendence to the whole Court, and not to a Bench of two Judges, and that therefore this Bench has no jurisdiction to dispose of this revision, but, as the ground deals with the jurisdiction of the Court and is of great importance, we allowed the learned counsel for the applicant to argue it. He contends that section 15 of the said Act gives the High Court power to "call for returns," to make general rules for regulating the practice and proceedings of the Courts subject to its appellate jurisdiction, and to prescribe forms for every proceeding in the said Courts, and no one can contend that a Bench of two judges of this Court has power to do any of the above acts, and that as the power of superintendence is also given by the same section a Bench of two Judges has no power to exercise it. If it has such a power the result will be that the whole Court will be bound by the Act of two

1903

IN THE MATTER OF THE PETITION OF KEDAR NATH.

Judges only. The learned Government Advocate in answer to this contention says that Rule 4 of the Rules of the High Court, which is as follows:—"Save as prescribed by law or by these rules or by special order of the Chief Justice every other case shall be heard and disposed of by a Bench of two Judges," gives this Bench a power to dispose of the application for revision, which undoubtedly is a case, and for which there is *no provision in the rules of the High Court.* He also argues that there has been a course of decisions in this Court as well as in other courts in which the cases under section 36 of the Legal Practitioners' Act have been dealt with by a Bench of two Judges and not by the High Court as a whole, and that the objection as to the jurisdiction of a Bench of two Judges to deal with the matter has never been taken. See I. L. R., 1 All., 101; I. L. R., 9 All, 104; I. L. R., 21 All., 181; Miscellaneous No. 39 of 1901, decided on the 6th June 1901; Miscellaneous No. 127 of 1904, decided on the 22nd February 1905, and the cases under section 36 of the Legal Practitioners' Act in the other High Courts quoted on p. 1040, under section 15 of the High Courts Act, in the Code of Civil Procedure by O'Kinealy, 6th edition.

In my opinion the contention of the learned counsel for the applicant is well founded. The power of superintendence conferred upon the High Court by section 15 of the High Courts Act, which power has been extended to interference with the orders passed under section 36 of the Legal Practitioners' Act, is no doubt conferred upon the whole of the High Court and not upon a Bench of two Judges. Rule 4 of the High Court Rules, owing to the saving clause, "save as provided by law," does not empower a Bench of two Judges to dispose of the Revision, inasmuch as that power under section 15 of the High Courts Act vests in the whole Court.

There exists, no doubt, a course of decisions in which the case under section 36 of the Legal Practitioners' Act have been disposed of by a Bench of two Judges, but in none of these cases was the question of jurisdiction raised, and in the absence of any decision on that point the course can be no authority for the provisions that a Bench of two Judges has jurisdiction to deal with

a case of this nature under section 15 of the High Courts Act. To infer a rule of law from the silence of the Judges is inconsistent with their function.

For these reasons I am of opinion that this Bench has no jurisdiction to dispose of the revision. It follows from what has been said that a single Judge of this Court has also no power to admit a revision from an order passed by a District Judge under section 36 of the Legal Practitioners' Act. The application for revision is not therefore properly before this Bench and the learned counsel for the applicant on his own showing has no *locus standi* to be heard. I would therefore reject the application.

AIKMAN, J.—This is an application by one Kedar Nath for the revision of an order of the learned District Judge of Meerut passed under the provisions of section 36 of the Legal Practitioners Act, 1879, whereby he directed that a list should be prepared of the names of eleven persons, one of them being the applicant Kedar Nath, who had been proved to his satisfaction to act habitually as touts, and ordered this list should be hung up in his own Court and in all Courts subordinate to him. He further ordered that the persons whose names were entered in these lists should be excluded from the precincts of these Courts.

The petitioner is represented here by learned counsel who has argued the case with much ability.

The Legal Practitioners' Act confers on this Court no right of interference by way of appeal or revision in the case of an order under section 36, nor is any right of interference conferred by the Code of Civil Procedure or the Code of Criminal Procedure. It has been held, however, that this Court can interfere with such an order under the general powers of superintendence over subordinate Courts which are conferred on High Courts by sections 15, 24 and 25 Vict., Cap. CIV, though, as will be seen from the Full Bench decisions in *Tej Ram* v. *Har Sukh* (1), and *Muhammad Suleman Khan* v. *Fatima* (2), its powers of interference under that section are very limited.

The learned counsel took objection to the competence of this Bench to hear this case. He contended in the first place with

(1) (1876) I. L. R., 1 All., 101. (2) (1886) I. L. R., 9 All., 104.

1908

IN THE MATTER OF THE PETITION OF KEDAR NATH.

reference to Rule 2 of the Rules of Court, that the case must be heard by a Bench of at least three Judges. The case is not a charge against a legal practitioner, and I hold it is not a disciplinary case within the meaning of the rule. I would therefore overrule this contention

Mr. *Howard* next contended that with reference to the language of sections 15, 24 and 25 Vict., Cap. CIV, this case could only be dealt with by the Full Court. This is an ingenious argument I think it must be admitted that no division Bench of the Court could *of its own authority* take upon itself to exercise the powers conferred by that section. But it appears to me that the Court has an inherent right to delegate to one or more of its members the power to deal with applications such as the present asking the Court to exercise the power of superintendence conferred by the section, and that it is not necessary that such cases should be dealt with by the Full Court. That the Court has delegated that power is clear from Rule 1 (xiii) and Rule 4. It would be in the highest degree inconvenient if every application under section 15 had to be dealt with by the whole Court. That Division Benches of the various High Courts have been in the habit of dealing with applications under section 15 is shown by numerous reported cases. I think for these reasons that Mr. *Howard's* second contention must be overruled.

Moreover, if his contention were held to be valid it would follow that the single Judge who issued the rule in this case had no power to issue it.

As stated above, the right of this Court to interfere under section 15 with the proceedings of a subordinate Court is strictly limited. It cannot interfere to correct an error of fact or even an error of law. See the cases cited above. All it can do is to direct a Court to exercise jurisdiction when it has declined to deal with a case within its jurisdiction or to abstain from taking action in matters of which it has not cognizance.

My only doubt in this case was whether the District Judge had power to make his order applicable to Rent Courts. These Courts are not subordinate to the District Judge in all branches of their work, but in certain classes of cases they are. I am not

therefore prepared to say that the order so far as it referred to Rent Courts was entirely without jurisdiction.

In my opinion no good ground has been made out for interference and I would dismiss the application.

BY THE COURT.—The order of the Court is that the application is dismissed.

1908

IN THE MATTER OF THE PETITION OF KEDAR NATH.

APPELLATE CIVIL.

1908
December 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD YAHIYA AND OTHERS (PLAINTIFFS) *v.* RASHID-UD-DIN (DEFENDANT).*

Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.

In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. *Ibn Husain* v. *Ram Das* (1) and *Ibn Hasan* v. *Brijbhukan Saran* (2) referred to.

THIS was a suit for contribution arising out of the following facts. There was a mortgage executed by the plaintiffs and some of the defendants and the predecessors of others on the 20th of August 1892. A decree for sale was obtained on it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. The plaintiffs came into Court alleging that their property had contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. They therefore claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court of first instance, relying on the case of *Ibn Hasan* v. *Brijbhukan Saran* (2), dismissed the suit upon the ground that the whole of the mortgage money was not realized by sale of the plaintiff's property alone. The plaintiffs appealed to the High Court.

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*First Appeal No. 155 of 1906, from a decree of Raj Nath, Subordinate Judge of Allahabad, dated the 29th of May 1906.

(1) (1889) I. L. R., 12 All., 110. (2) (1904) I. L. R., 26 All., 407.

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Act II of 1899 (Stamps), as modified up to 1st March, 1907 ...	Re 1 (2 a.)
Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February 1908 ...	2 a. 6 p. (1 a.)

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Act XV of 1856 (Hindu Widow's Re-marriage) ... ... In Nagri, 6 p. (1 a.)
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Act XVI of 1873 Village and Road, Police, United Provinces) ... ... In Urdu. 1 a. (1 a)
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Act XII of 1896 (Excise), as modified up to 1st March, 1907 ... ... In Urdu, 2 a. 9 p. (2 a.)
Ditto ditto ditto ... ... In Nagri, 3 a. 3 p. (2 a.)
Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 ... ... In Urdu. 9 p. (1 a)
Ditto ditto ditto ... ... In Nagri. 9 p. (1 a)
Act I of 1906 [Indian Tariff (Amendment)] ... ... In Urdu. 3 p. (1 a)
Ditto ditto ditto ... ... In Nagri. 3 p (1 a.)
Act III of 1906 (Coinage) ... ... In Urdu, 9 p. (1 a)
Ditto ditto ditto ... ... In Nagri. 9 p. (1a)
Act V of 1906 (Stamp Amendment) ... ... In Urdu, 3 p (1 a.)
Ditto ditto ditto ... ... In Nagri 3 p. (1 a)
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Ditto ditto ditto ... .. In Nagri. 1 a. 6 p (1 a.)
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Ditto ditto ditto ... ... In Nagri. 3 p. (1 a.)
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Act II of 1908 (Tariff) ... ... In Urdu. 3 p. (1 a.)
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TABLE OF CASES REPORTED.

PAGE.

PRIVY COUNCIL.

FULL BENCH.

APPELLATE CIVIL.

REVISIONAL CIVIL.

TABLE OF CASES CITED.

PAGE.

INDEX.

PAGE.

Held by the Judicial Committee that the order of the Revenue

all the villages sued for.

Chokhey Singh *v.* Jote Singh, I. L. R., 31 All. ... 73

——1877—XV—(INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 97—*Agreement to sell—Rescission of contract—Act No. IX of* 1872 *(Indian Contract Act), sections* 55, 65—*Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of*

defendants under the foreclosure decree. The defendants neither

the decisions of the High Court.

Amma Bibi *v.* Udit Narain Misra, I. L. R., 31 All. .. 63

138, *See* Civil Procedure Code, sections 244, 318, 319 82

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 88 AND 90—

could be maintained unless the whole amount of the mortgage was discharged, and the majority of the Judges constituting the Bench answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in *Ibn Hasan* v. *Brijbhukan Saran* (1) upon which reliance has been placed by the appellants' learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contirbution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of *Ibn Hasan* v. *Ram Dai* (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

BY THE COURT:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1904) I. L. R., 26 All., 407. (2) (1889) I. L. R., 12 All., 110.

P. C.*
1908
November 10

PRIVY COUNCIL.

AMMA BIBI AND OTHERS (PLAINTIFFS) *v.* UDIT NARAIN MISRA AND OTHERS (DEFENDANTS).

and 3 other appeals consolidated.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Act No XV of 1877 (Indian Limitation Act), schedule II, article 97—Agreement to sell—Rescission of contract—Act No IX of 1872, (Indian Contract Act, sections 55, 65—Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of money paid—Accrual of cause of action.

The defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immovable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. On 10th December 1896 the plaintiff instituted a suit against the defendants for a refund of the money so paid by him, alleging that the defendants had failed to fulfil their part of the contract, which was to execute a conveyance of the property within one month. The defendants denied this, and the first Court, while finding that the period of one month had been fixed by the parties for the execution of the deed of sale, held on the evidence that time was not of the essence of the contract, and that the plaintiff could not (as he claimed) rescind the contract under section 55 of the Contract Act and recover the money he had paid, and this decision was on appeal affirmed by the High Court on 18th January 1900. On 16th April 1900 the plaintiff sued the defendants claiming specific performance of the agreement to sell, or in the alternative for a refund of the money paid by him as part of the consideration for the sale agreed upon. The first Court gave the plaintiff a decree for specific performance. On appeal by the defendants it was held by the High Court on 30th April 1903, (1) that the terms of the agreement to sell not being satisfactorily proved no decree for specific performance could be made; (2) that the plaintiff was therefore entitled to recover the money which he had paid under the agreement; and (3) that, following the case of *Bassu Kuar* v. *Dhum Singh* (1), the plaintiff's alternative claim for a refund on failure of consideration was governed as to limitation by article 97 of schedule II of the Limitation Act 1877, and was not barred by lapse of time, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. The plaintiff appealed from the decision of the High Court of 18th January 1900, and the defendants from that of 30th April 1903 to His Majesty in Council, and both

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*Present.—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1888) I. L. R., 11 All., 47, L. R., 15 I. A., 211.

appeals were dismissed by their Lordships of the Judicial Committee, who upheld the decisions of the High Court.

FOUR appeals consolidated (Nos 55, 56, 57 and 58 of 1906) from decrees of the High Court at Allahabad. In Nos 55 and 56 the decrees (18th January 1900) of the High Court affirmed decrees (4th May 1897) of the Subordinate Judge of Gorakhpur; and in Nos 57 and 58 the decrees (30th April 1903) of the High Court reversed decrees (27th September 1900) of the same Subordinate Judge

The original plaintiff in all the four suits out of which the appeals arose was one Muhammad Minnat Ulla who is now represented by the appellants in appeals 55 and 56, and the respondents in appeals 57 and 58. On 10th December 1896 Minnat Ulla brought two suits (275 and 276 of 1896) against two separate sets of defendants, of whom the principal was Udit Narain Misra in suit 275 and Rama Shankar Misra in suit 276, those defendants now being respectively the principal respondents in appeals 55 and 56 and the principal appellants in appeals 57 and 58 In both the suits 275 and 276 of 1896 the plaintiff alleged that the defendants had agreed to sell certain property to him on, (among others) the condition that they should execute and register the necessary sale-deeds within a month from the 15th September 1896 the date of the agreements. In accordance with these agreements the plaintiff paid a substantial portion of the consideration for the sales as earnest money in the manner agreed upon. The defendants however did not execute the sale-deeds within the stipulated time, and the plaintiff therefore sued them for a return with interest of the purchase money which had been paid by him in respect of the sales, alleging that the defendants, by omitting to execute the deeds within a month, had failed to carry out their contract. In these suits the Subordinate Judge found on the evidence that one month's time was agreed upon between the parties for the completion of the sale, and in his judgment he said :—

"The plaintiff comes into court on the allegation that the defendants having failed to complete the sale within the specified time of one month, the contract to sell and purchase is at an end and that therefore he is entitled to recover the amount which he has paid for them together with interest thereon. Section 55 of Act IX of 1872, therefore applies to the case and the plaintiff is entitled to rescind the contract if time be found to have been

1908

AMMA BIBI v. UDIT NARAIN MISRA.

of the essence of the contract. In order to determine this I must first refer to the terms of the contract embodied in the petition, Exhibit II. The terms as set forth in the document are as follow:—'That in lieu of the aforesaid amount (Rs 13,865-6) as well as in lieu of the amount due to Maulvi Minnat Ulla, the defendant would in the course of one month execute and have registered a sale-deed of the four villages specified below in favour of the Maulvi at the rate of Rs. 2-6 per cent. per annum according to the Government roll, and whatever may be found due to the Maulvi after the execution of the sale-deed, the condition of the former deed would hold good and according to the conditions in the old deed the same property would continue hypothecated in the balance of the purchase money and at the time of the execution of the sale-deed, the Maulvi would execute an agreement to reconvey the property sold to the defendant within one year subject to the conditions agreed upon between the parties.' In these terms I find nothing to support the contention that the time of one month is of the essence of the contract According to the terms of the agreement, the one year for reconveyance is to be reckoned after the execution of the sale-deed, on whatever date it may be executed It does not appear that the plaintiff had to sustain a substantial loss if the sale was not completed within one month."

And after referring to the cases of *Ram Gopal Mookerjee* v. *Masseyk* (1), *Brojo Soondurree Debia* v. *Collins* (2), *Sooltan Chand* v. *Schiller* (3), *Dadabhoy Dajibhoy Baria* v. *Pestonji Marwanji Barucha* (4) and *Buldeo Doss* v. *Howe* (5), which last case was distinguished from the present, the Subordinate Judge concluded:—

"For the reasons and with regard to the rulings cited above I am of opinion that the time of one month was not of the essence of the contract, and that therefore the plaintiff is incompetent to rescind it."

He dismissed both suits on that ground; and on appeal the High Court (SIR ARTHUR STRACHEY, C. J., and BANERJI, J.) on 18th January 1900 said in affirming that decision—

"We agree with the Court below that there is no reason for the view that time was of the essence of the contract. Upon that view the decision of the Court below is correct and the appeal must be dismissed with costs"

The plaintiffs obtained leave to appeal to His Majesty in Council.

The suits which led to appeals 57 and 58 were on dismissal of the suits 275 and 276 of 1896 instituted in the Court of the same Subordinate Judge on 16th April 1900 being numbered 83 and 84 of that year. The facts with regard to them will be found

(1) (1860) 8 Moo. I. A., 239.
(2) (1870) 13 W. R., 359.
(3) (1878) I. L. R., 4 Calc., 252.
(4) (1893) I. L. R., 17 Bom., 457 (464).
(5) (1880) I. L. R., 6 Calc., 64.

fully stated in the report of the hearing of them on appeal before the High Court (SIR JOHN STANLEY, C.J. and BURKITT, J.) in I. L. R., 25 All., 618. The suits were for specific performance of the contract, or in the alternative for return of the earnest money paid by the plaintiff. The Subordinate Judge gave the plaintiff decrees for specific performance. On appeal the High Court stated that in view of the conflict of testimony they were not satisfied as to what the contract really was, and could not therefore give a decree for specific performance; but holding that the suits were not barred by limitation as was contended by the defendants, the High Court made a decree in each suit for the recovery of the sum paid by the plaintiff with interest. From that decision the defendants appealed to His Majesty in Council.

In these appeals

Ross for the appellants in appeals 55 and 56, and for the respondents in appeals 57 and 58 contended in appeals 55 and 56 that the courts below were in error in holding that time was not of the essence of the contract The Subordinate Judge found on the evidence that the period of one month was agreed upon by the parties for the completion of the sale, and if so, it must have been intended to be a binding condition. It was submitted that time *was* of the essence of the contract, and that the plain tiff was entitled on failure of the defendants to complete the sale within the time stipulated to rescind the contract under section 55 of the Contract Act (IX of 1872) and that the decision of the Courts in India to the contrary should be set aside.

With respect to appeals 57 and 58 it was contended for the respondents that the suits out of which they arose had been rightly held barred either by the Civil Procedure Code (Act XIV of 1882) or by the Limitation Act (XV of 1877). As it had been found that the contract was not enforceable and a decree for specific performance could not therefore be granted, it was clear that the plaintiffs, on their alternative plea, were entitled for the reasons given by the High Court to a return of the money paid by them in consideration of the sale. The decision in these appeals should be upheld.

1908

AMMA BIBI v. UDIT NARAIN MISRA.

De Gruyther, K. C., for the respondents in appeals 55 and 56, and the appellants in appeals 57 and 58, contended that the lower Courts had rightly held that time was not of the essence of the contract, even if the period of a month had been fixed for completion, and that the contract could not therefore be rescinded under section 55 of the Contract Act.

For the appellants in appeals 57 and 58 it was contended that the suits were barred by the law of limitation; article 113 of Schedule II of the Limitation Act prescribing a period of three years from the date fixed for performance of the contract, so that the cause of action arose on the expiry of the month which it had been found was so fixed, and these suits were brought more than three years after that time. With regard to the plaintiffs' right to a return of the money paid, that also was barred by the three years period of limitation, the cause of action arising from the same date. It was also submitted that that question was *res judicata* in the former suit, and the present suits for it were therefore barred by section 13 of the Code of Civil Procedure, and also by section 43 of that Code. Reference was also made to section 65 of the Contract Act, articles 97 and 120 of the second schedule of the Limitation Act, and section 12 of the Civil Procedure Code.

1908, *November* 10*th* —The judgment of their Lordships was delivered by LORD MACNAGHTEN :—

Their Lordships are of opinion that the judgment of the High Court is quite right They will therefore humbly advise His Majesty that the appeals and the cross-appeals ought all to be dismissed. The parties will bear their own costs of their respective appeals.

Appeals dismissed.

Solicitors for appellants in appeals 55 and 56, and for respondents in appeals 57 and 58 :—*Barrow, Rogers and Nevill.*

Solicitors for respondents in appeals 55 and 56, and for appellants in appeals 57 and 58 :—*Ranken, Ford, Ford and Chester.*

J. V. W.

CHOKHEY SINGH AND ANOTHER (DEFENDANTS) v. JOTE SINGH (PLAINTIFF) AND CROSS-APPEAL.

P. C.*
1908.
November 17
December .

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Compromise—Document signed by claimants in mutation proceedings—Acquiescence in partition proceedings.—Act No. XVII of 1876 *(Oudh Land Revenue Act), section 74—Suit to dispute title and recover possession of shares to which plaintiff was entitled by Hindu law—Estoppel—Suit in Civil Court on title after partition.*

THE plaintiff and defendants were claimants to the estate, consisting of 30 villages, of a deceased Hindu, and though by the ordinary Hindu law the plaintiff, as brother of the deceased, was entitled to the whole property as against the defendants, who were nephews (son, of a deceased brother) the three claimants in the mutation proceedings signed in 1896 a document which stated that the property was held, one moiety by the plaintiff and the other moiety by the defendants, and that "there is no other legal heir except the deponents; the mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto." and the revenue authorities effected mutation of names in that way. In 1902 partition which left the parties in the same state as to possession was effected in accordance with the provisions of the Oudh Land Revenue Act (XVII of 1876). In a suit brought in 1904 to recover possession as heir of the deceased of the half share held by the defendants, the latter pleaded (*inter alia*) that their possession was the result of a compromise come to between the parties in the mutation proceedings which was evidenced by the document of 1896, and that the plaintiff was estopped by such mutual arrangement from asserting his present claim.

Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1896 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

In the partition proceedings the plaintiff made no objection to the defendants' title under section 74 of Act XVII of 1876; but he filed an application in which he asked that "the share of Munnu Singh (the deceased) should be decided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh" Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 29 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons beside the parties to the present suit and a so

* *Present*:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

1908

CHOKHEY SINGH v. JOTE SINGH.

because the plaintiff should have raised the question of the defendants' title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition.

Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no other parties than the parties to this suit were affected by the partition of the shares in the one village as to which the Courts differed. The Revenue Court had clearly given effect to the plaintiff's application as to the question of title, for no inquiry under section 74 of Act XVII of 1876 was made and the question of title was left to be decided by the Civil Court. The grounds of estoppel therefore failed and the plaintiff was entitled to the shares in all the villages sued for.

APPEAL (61 of 1907) and cross-appeal (62 of 1907) consolidated from a judgment and decree (4th May 1906) of the Court of the Judicial Commissioner of Oudh which varied a decree (18th June 1905) of the Subordinate Judge of Sitapur who had decreed the plaintiff's claim in full.

The principal question raised on this appeal was the right of succession to the property consisting of 30 villages of one Munnu Singh who died on 24th May 1896. The claimants were his brother Jote Singh, and Chokhey Singh and Gajraj Singh his nephews the sons of a deceased brother. Under the ordinary Hindu law applicable Jote Singh was the nearest heir and entitled to the whole estate, but by an order of the revenue authorities dated 5th November 1896 mutation of names was in fact effected by leaving the property as it was then held, namely an eight anna share in the name of Jote Singh, and the other eight anna share in the names of Chokhey Singh and Gajraj Singh, the former being the elder having a slightly larger share. After mutation of names the parties remained in possession of their respective shares, and later a partition of a portion of the estate was effected in accordance with the provisions of Act XVII of 1876.

The suit out of which the present appeal arose was instituted on 24th November 1904 by Jote Singh against Chokhey Singh and Gajraj Singh to recover possession from them of the eight anna share of Munnu Singh's estate which they had held before and since the mutation proceedings and refused to give up. The plaintiff claimed title as next heir and stated that his consent to the mutation proceedings was given under a misconception of law.

The defence was that on the death of Munnu Singh the defendants, though excluded by the ordinary law, claimed to be entitled to the whole estate under an oral will of Munnu Singh and as being joint in estate with him, and that a compromise was come to between the parties, the result of which was the order in the mutation proceedings. The defendants pleaded a custom in the family that nephews were not excluded by brothers, and contended that the plaintiff was estopped by the mutual arrangement, and by his having acquiesced in the partition from asserting his present claim.

Of the documentary evidence referred to in their report exhibit A 1, which was a joint statement of the claimants in the mutation proceedings, the material portion is set out in their Lordships' judgment. Exhibit A 17, which was a copy of a petition of objections filed by the plaintiff Jote Singh under section 73 of Act XVII of 1876 (the Oudh Land Revenue Act), dated 27th October 1900, in the matter of a claim by a person of the same name (Jote Singh) for partition of Thoke Bhawani in the village Bihat Biram, was to the effect that the plaintiff desired that his interest in the village should be separated from that of the person claiming partition, and stated that he "does not wish to keep his share joint with that of the other defendants." Exhibit No. 58, the purport of which (so far as it is material) is also given in their Lordships' judgment, was an application filed by Jote Singh in reply to the objections taken by the present defendants Chokhey Singh and Gajraj Singh in the matter of the partition of the village Bihat Biram, dated 20th December 1902, and Exhibit A 18 was the order of the Deputy Collector of Sitapur, dated 5th July 1902, regarding the partition of the village of Bihat Biram, and showed that the village was divided into two thokes namely Hathi Singh, and Bhawani Singh, the former of which was allotted to persons none of whom were parties to the present suit; and the latter was partitioned between Chokhey Singh and Gajraj Singh the defendants, who received 8 annas 3½ pies of it, and Jote Singh the plaintiff, who obtained 7 annas and 8½ pies.

The Subordinate Judge found that there was no ground for the defendants' allegations that they were joint with Munnu Singh, and that he made an oral will in their favour; and held

1908

CHOKHEY SINGH v. JOTE SINGH.

that the dispute on the death of Munnu Singh was not settled by a compromise as alleged by the defendants; that the plaintiff did not consent to mutation in favour of the defendants under any misconception of law; that the succession to the property was not governed by any special custom; and that the plaintiff was not estopped from claiming the property in suit under the provisions of the ordinary Hindu Law. After finding that there was a partition of the property subsequent to the mutation, the Subordinate Judge said:

"It is urged by the learned vakils for the defendants that, inasmuch as there was a partition in accordance with the mutation proceedings, the plaintiff cannot be allowed to bring this suit, the object of which is, as they contend, to disturb or set aside the partition proceedings.

"I do not think that the object of this suit is to disturb or set aside the partition effected by the Revenue Court. The partition remains intact, even after the plaintiff gets a decree in this case. The fact that the decree in this case will either entitle the plaintiff to a fresh partition with regard to the land in defendants' possession or entitle the plaintiff to the land in defendants' possession cannot be said to have an effect of disturbing or setting aside the partition made by the Revenue Courts" I, therefore, find that the fact of partition between the parties does not render the suit unmaintainable. It was further argued by the learned vakils for the defendants that the statement of the plaintiff in the mutation proceedings is a bar to this suit. There is no doubt that the plaintiff through his agent stated before the Tahsildar of Misrikh during the pendency of the mutation proceedings that the defendants were in possession of half the property of Munnu Singh and that the mutation should be effected accordingly. It has not been proved that this statement was the result of any compromise or settlement arrived at between the parties or that it was made to avoid any litigation. Hence, as held by their Lordships of the Privy Council in *Muhammad Imam Ali Khan* v. *Husain Khan* (1) the statement in question can be no bar to this suit.

The decree made by the Subordinate Judge was one in favour of the plaintiff for possession of the property in dispute.

The appeal was heard by two Judges (*Mr. E. Chamier*, Officiating Judicial Commissioner, and *Mr. L. G. Evans*, additional Judicial Commissioner) of the Court of the Judicial Commissioner of Oudh, who agreed with the findings of the Subordinate Judge that the defendants and Munnu Singh did not constitute a joint family, and that there was no will of Munnu Singh in their favour; that no custom of the kind alleged by the defendants was proved; that the allegation of a dispute and a

(1) (1898) I. L. R., 26 Calc., 81; L. R., 25 I. A., 161.

subsequent compromise between the parties, on the death of Munnu Singh in 1896, was not established; and that, rejecting the evidence founded on such allegation, there was nothing in the circumstances of the case with regard to the shares in 29 of the villages in suit which afforded a ground for holding that the plaintiff was estopped from bringing this suit, citing as authority the case of *Muhammad Imam Ali Khan* v. *Husain Khan* (1) with regard, however, to the share in the village of Bihat Biram they considered that the circumstances were somewhat different, and that the plaintiff was estopped from claiming any share in that village The decision of the Court of the Judicial Commissioner on that point is set out in their Lordships' judgment. The claim of the plaintiff was therefore allowed to shares in all the disputed property except the shares in the village of Bihat Biram.

Both parties appealed from this decision to His Majesty in Council.

On these appeals:

De Gruyther, K. C., and *J. Redwood Davies* for the appellants in appeal No. 61 and for the respondents in the cross-appeal contended that the evidence on the record was sufficient to establish a compromise of the rights of the parties claiming as heirs to the estate of Munnu Singh under which the defendants validly acquired the half share of which they had been ever since in possession. That such an arrangement was made was evidenced by the fact that mutation of names was made on those terms, and by the plaintiff's consent to such mutation having been given. He admitted in his evidence that his consent was not given under any misconception of law as he was at the time aware that he was entitled to the whole of the property. Exhibit A 1 was referred to as showing that the plaintiff agreed to the defendants holding the half share which he was now suing for; that document stated that no one objected to mutation being made in that way. The plaintiff also had acquiesced in that settlement for a long time, and had allowed a partition of the property to be made in accordance with it; and it was submitted that he could not now maintain a suit to set aside that disposition of the property;

(1) (1898) I. L. R., 26 Calc., 81: L. R., 25 I. A., 161.

1908

CHOKHEY SINGH
v.
JOTI SINGH.

Reference was made to the Oudh Land Revenue Act (XVII of 1876) sections 68, 73, 74 and 75; and the case of *Muhammad Imam Ali Khan* v. *Husain Khan* (1) which had been cited in the judgments of the courts below as authority for the plaintiff's not being estopped by any admission made during the mutation proceedings, was distinguished: and it was submitted that the plaintiff was estopped by his conduct, and by the provisions of the above Act, from claiming not only any share in the village of Bihat Biram, but also any portion of the property in dispute.

Sir R. Finlay, K. C. and *G. E. A. Ross* for the respondent in appeal 61 and for the appellant in the cross-appeal contended in appeal 61 that on the evidence there was no dispute between the parties, which was settled by awarding the property in suit to the defendants; and that had been established by the concurrent findings of both the courts in India. The mutation proceedings conferred no title on the defendants, nor in any way affected the plaintiff's rights, and the Court of the Judicial Commissioner had rightly held that the plaintiff was not estopped by his conduct from maintaining the present suit. That court said:—"All that the defendants did in consequence of the action or inaction of the plaintiff was to take possession of half the property and enjoy the profits thereof. All that is proved in the present case is that the plaintiff gratuitously admitted the right of the defendants to a share." Reference was made to *Muhammad Imam Ali Khan* v. *Husain Khan* (2). In the cross-appeal it was contended that the Court of the Judicial Commissioner was in error in holding that the plaintiff was estopped from claiming the share in the village of Bihat Biram because the special circumstances which had been found by that court to estop the plaintiff from claiming the said share did not amount to an estoppel. Nor was he estopped by the provisions of Act XVII of 1876 (The Oudh Land Revenue Act), to sections 68 and 219, clauses (*d*) and (*e*), of which Act reference was made. Exhibit No. 58 was referred to, to show that in the partition proceedings the plaintiff reserved his right to question in a separate suit the title of the defendants to the share in the village of Bihat Biram. Assuming, therefore, without admitting, that the plaintiff did not raise any objection in

(1) (1898) I. L. R. 26 Calc. 81: L. R. 25 I. A. 161.

(2) (1898) I. L. R. 26 Calc. 81 (90,100): L. R., 25 I. A., 161 (177.)

the partition proceedings with regard to the right of the defendants to possession of the said share, he was not debarred from claiming the share in a suit in the Civil Court.

De Gruyther, *K. C.*, replied.

1903, *December 7th* :—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE :—

The suit out of which these appeals arise relates to the right of succession to the property of one Munnu Singh, who died childless on the 24th May 1896. The property consists of shares in some thirty villages in the District of Sitapur, in the Province of Oudh. The claimants are Jote Singh, the only surviving brother of the deceased, and Chokhey Singh and Gajraj Singh, his nephews, the sons of a brother who had predeceased him.

It is not disputed that, under the ordinary Hindu law applicable to the family, Jote Singh was the nearest heir and entitled to succeed to the whole estate. His nephews, however, sought to defeat his claim on various grounds. They alleged that they had been joint with Munnu Singh during his life-time, and that he had made an oral will in their favour. Both Courts in India found against them on these points. They set up a family custom, whereby brothers and brothers' sons are entitled to succeed together, but they entirely failed to establish such a custom. They further asserted a compromise—and this was the only ground argued before their Lordships—under which they claimed to have acquired a half-share in the estate, by agreement with Jote Singh.

There is no doubt that by an order of the 5th November, 1896, mutation of names in respect of Munnu Singh's property was effected in the following manner, *viz.*, one half into the name of Jote Singh and one half into the names of Chokhey Singh and Gajraj Singh, the former, being the elder, having a slightly larger share. But this mutation of names by itself confers no proprietary title, and it was therefore sought to prove that it was the result of a valid compromise made at the time of the mutation proceedings, and that Jote Singh was thereby estopped from asserting his present claim. Both Courts in India have found as a fact that there was no such compromise,

1903

CHOWDHRY SINGH *v.* JOTE SINGH.

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(2) (1898) I. L. R. 26 Calc. 81 (99,100): L. R., 25 I. A., 161 (177.)

the partition proceedings with regard to the right of the defendants to possession of the said share, he was not debarred from claiming the share in a suit in the Civil Court.

De Gruyther, K. C., replied.

1908, *December 7th* :—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE :—

The suit out of which these appeals arise relates to the right of succession to the property of one Munnu Singh, who died childless on the 24th May 1896. The property consists of shares in some thirty villages in the District of Sitapur, in the Province of Oudh. The claimants are Jote Singh, the only surviving brother of the deceased, and Chokhey Singh and Gajraj Singh, his nephews, the sons of a brother who had predeceased him.

It is not disputed that, under the ordinary Hindu law applicable to the family, Jote Singh was the nearest heir and entitled to succeed to the whole estate. His nephews, however, sought to defeat his claim on various grounds. They alleged that they had been joint with Munnu Singh during his life-time, and that he had made an oral will in their favour. Both Courts in India found against them on these points. They set up a *family custom*, whereby brothers and brothers' sons are entitled to succeed together, but they entirely failed to establish such a custom. They further asserted a compromise—and this was the only ground argued before their Lordships—under which they claimed to have acquired a half-share in the estate, by agreement with Jote Singh.

There is no doubt that by an order of the 5th November, 1896, mutation of names in respect of Munnu Singh's property was effected in the following manner, *viz*, one half into the name of Jote Singh and one half into the names of Chokhey Singh and Gajraj Singh, the former, being the elder, having a slightly larger share. But this mutation of names by itself confers no proprietary title, and it was therefore sought to prove that it was the result of a valid compromise made at the time of the mutation proceedings, and that Jote Singh was thereby estopped from asserting his present claim. Both Courts in India have found as a fact that there was no such compromise,

1908

CHOKHEY SINGH
v.
JOTE SINGH.

and their Lordships see no reason to dissent from the conclusion at which they arrived. It was, however, argued before their Lordships that the Courts below had not given sufficient attention to a document (Exhibit A-1) signed by the three claimants in the mutation proceedings, in which it is stated that—

> "Jote Singh, own brother of the deceased, is in possession of half of the *haqqiat* of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the *jethansi* right of Chokhey Singh at the rate of 4 per cent., are in possession of the other half of his share. There is no other legal heir except the deponents. The mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto."

There is no reference in the document to any compromise, and it does not appear to their Lordships that it contains any words that can be construed as amounting to an abandonment by Jote Singh of his legal rights. It is merely a statement of the facts as they existed in regard to the possession of the property—the main point considered by the Revenue authorities upon applications for mutation of names—and, by its silence as to a compromise, tends to support the conclusion that no compromise was ever made.

The Courts in India concurred in holding that, as regards twenty-nine of the villages in which Munnu Singh was a sharer, Jote Singh was entitled to succeed him as his heir according to Hindu law, but as regards one village, Bihat Biram, they differed. That village had been the subject of partition proceedings under the Oudh Land Revenue Act (Act XVII of 1876), and the Judicial Commissioner held that, as a portion of Munnu Singh's share in Bihat Biram was allotted to Chokhey Singh and Gajraj Singh at the partition, Jote Singh was estopped from now claiming it. The Subordinate Judge had held that there was no such estoppel.

The judgment of the learned Judicial Commissioner upon the point is in these terms:—

> In 1900, one Jote Singh (not the plaintiff) applied for partition of one of the thokes in the village, whereupon the plaintiff presented a petition (*see* Exhibit A-17) praying that his entire interest in the village should be separated from that of the applicant Jote Singh as well as from the share of the present defendants, and this was done with the result that the defendants were allotted a separate patti, which includes the share now in dispute, and their father, Hakim Singh's, share in the village as one of the sons of [illegible] Singh.

The effect of the decree of the Court below is to give the plaintiff a portion of the patti allotted to the defendants at the partition. The defendants, no doubt, conducted their case at the partition on the assumption that they were entitled to half the *share of Munnu Singh, junior*, and it seems impossible now to put them back into the position which they occupied before the partition, for the partition dealt with the shares of other persons besides those of the parties to the present suit.

Moreover, in the partition the plaintiff had an opportunity, of which he should have *availed himself, of objecting to the defendants' title* (*see* section 74 of Act XVII of 1876, the Revenue Act which was then in force). Had he raised the question then, it would have been disposed of before the partition. In my opinion, it is too late now for the plaintiff to claim that portion of Munnu Singh's share in Bihat Biram which was allotted to the defendants at the partition. It appears to me that as to this the plaintiff is estopped.

The learned Judicial Commissioner appears to their Lordships to have been under a misconception on two points of fact. If the order of the Revenue Court in the partition proceedings be looked at, it will be found that it divides the village into two thokes, the first of which, thoke Hathi Singh, is partitioned among five families, none of whom are parties to this suit; while the second thoke, Bhawani Singh, is divided between the parties to this suit, in almost equal proportions. The shares of no other persons are therefore affected by the partition order. In the second place, it appears from Exhibit No. 58, an application filed by Jote Singh in reply to the objections taken by Chokhey Singh and Gajraj Singh in the partition proceedings, and dated 20th December 1902, that Jote Singh asked that "the share of Munnu Singh should be divided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." The Revenue Court appears to have given effect to this application, for no inquiry under section 74 of Act XVII of 1876 was made, and the question of title was left to be decided by the Civil Court in Jote Singh's present suit, which was filed on the 24th November 1904. In the opinion of their Lordships the grounds of estoppel relied on by the learned Judicial Commissioner both fail.

Their Lordships will humbly advise His Majesty that the appeal of Chokhey Singh and Gajraj Singh should be dismissed and the cross appeal of Jote Singh allowed; that the decree of the Judicial Commissioner should be discharged, and the decree

1908

CHOKHEY SINGH v. JOTE SINGH.

of the Subordinate Judge restored except as to costs, Chokhey Singh and Gajraj Singh paying Jote Singh's costs in both Courts.

The appellants Chokhey Singh and Gajraj Singh will pay the costs of Jote Singh in both the appeal and the cross-appeal.

Appeal (No. 61) dismissed.

Cross appeal (No. 62) allowed.

Solicitors for the appellants in appeal No. 61, and for the respondents in appeal No. 62:—*T. L. Wilson & Co.*

Solicitor for the respondent in appeal No. 61, and for the appellant in appeal No. 62:—*Douglas Grant.*

J. V. W.

1908
December 14.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr Justice Aikman and Mr Justice Griffin.

BHAGWATI (PLAINTIFF) *v.* BANWARI LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 244, 318, 319—Execution of decree—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder auction-purchaser—Act No. XV of 1877 (Indian Limitation Act) schedule II, article 138

A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree *Subbajit v. Sri Gopal* (1) and *Mahabir Pershad Singh v. Macnaghten* (2) referred to.

If after confirmation of a sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure, but also by suit, section 244 of the Code is not a bar to such suit and does not apply to such an application *Raynor v. The Mussoorie Bank, Limited* (3), *Maganlal v. Doshi Mulji* (4) and *Gulzari Lal v. Madho Ram* (5) referred to. *Kalian Singh v. Thakur Das* (6) and *Sheo Narain v. Nur Muhammad* (7) overruled. *Madhusudan Das v. Gobinda Pria Chowdhurani* (8) and *Kattayat Pathumayi v. Raman Menon* (9) dissented from *Mahomed Mosraf v. Habib Mia* (10) followed *Seru Mohan*

*Second Appeal No. 258 of 1906 from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 4th of January 1906, affirming a decree of Rama Das, Munsif of Amroha dated the 24th of September 1904.

(1) (1894) I. L. R., 17 All., 222.
(2) (1889) I. L. R., 16 Calc., 682.
(3) (1885) I. L. R., 7 All., 681.
(4) (1901) I. L. R., 25 Bom., 631.
(5) (1904) I. L. R., 26 All., 447.
(6) Weekly Notes, 1906, p. 87; S. C., 3 A. L. J. R., 214.
(7) (1907) I. L. R., 30 All., 72.
(8) (1899) I. L. R., 27 Calc., 34.
(9) (1902) I. L. R., 26 Mad., 740.
(10) (1904) 8 C. L. J., 749.

Bania v. *Bhagoban Din Pandey* (1), *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2) and *Sandhu Taraganar* v. *Hussain Sahib* (3) referred to. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4) distinguished.

No appeal will lie from an order under section 318 of the Code of Civil Procedure. *Narain Singh* v. *Pargash* (5), *Dhunda* v. *Durga* (6), *Ghulam Shabbir* v. *Dwarka Prasad* (7), *Baboo Luchmee Narain* v. *Baboo Bhairow Pershad* (8), *Bhimal Das* v. *Ganesha Koer* (9) and *Mahomed Mosraf* v. *Habib Mia* (10) referred to

An application under section 318 of the Code is not an application for execution or to take a step in aid of execution. The opinion of KNOX, J., in *Kesri Narain* v. *Abul Hasan* (11) and *Moti Lal* v. *Makund Singh* (12) dissented from. So *held* by BANERJI, J, (AIKMAN and GRIFFIN JJ., concurring).

STANLEY, C. J., *contra* (KNOX J., concurring).

Where after sale held in execution of a decree and confirmation of such sale the auction purchaser fails to get possession of the property purchased, proceedings on the part of the purchaser in order to obtain possession are still proceedings relating to the execution, discharge or satisfaction of the decree within the meaning of section 244 of the Code of Civil Procedure. *Moti Lal* v. *Makund Singh* (12), *Muttia* v. *Appasami* (13), *Sanatoolla Molla* v. *Raj Kumar Roy* (14), *Kattayat Pathumayi* v. *Raman Menon* (15), *Har Din Singh* v. *Lachman Singh* (16), *Kasinathi Ayyar* v. *Uthumansa Rowthan* (17), *Ram Narain Sahoo* v. *Bandi Pershad* (18), *Sandhu Taraganar* v. *Hussain Sahib* (3), and *Sheo Narain* v. *Nur Muhammad* (19) referred to.

And if the decree-holder has become the auction-purchaser he does not thereby lose his character of decree-holder so as to make any questions thereafter arising between himself and the judgment-debtor other than questions between the parties to the suit in which the decree was passed. *Mahabir Pershad Singh* v. *Macnaghten* (20), *Viraraghava* v. *Venkata* (21) and *Muttia* v. *Appasami* (13) referred to.

THE facts out of which this appeal arose were as follows:

One Musammat Mohini obtained a decree for sale on a mortgage against Shankar Lal. On November 16, 1894, the property was put up to sale and purchased by the decree-holder in the name of Bansidhar. On November 27, 1897, Musammat Mohni obtained the certificate of sale, and on September 20, 1900,

(1) (1883) I. L. R., 9 Calc., 602
(2) (1887) I. L. R., 14 Calc., 644
(3) (1904) I. L. R., 28 Mad., 87.
(4) (1892) I. L. R., 19 Calc., 683
(5) Weekly Notes, 1886, p. 45.
(6) Weekly Notes, 1893, p. 122.
(7) (1895) I. L. R., 18 All., 36.
(8) N.-W. P., H. C. Rep., 1866, Misc. Ap., 5.
(9) (1897) 1. C. W. N., 658.
(10) (1904) 6 C. L. J., 749.
(11) (1904) I. L. R., 26 All., 365.
(12) (1897) I. L. R., 19 All., 477.
(13) (1890) I. L. R., 13 Mad., 504.
(14) (1900) I. L. R., 27 Calc., 709.
(15) (1903) I. L. R., 26 Mad., 740.
(16) (1900) I. L. R., 25 All., 343.
(17) (1901) I. L. R., 25 Mad., 529.
(18) (1904) I. L. R., 31 Calc., 737.
(19) (1907) I. L. R., 30 All., 72.
(20) (1889) I. L. R., 16 Calc., 682.
(21) (1882) I. L. R., 5 Mad., 217.

1908

BHAGWATI v. BANWARI LAL.

she made a gift of the property to the plaintiff, Musammat Bhagwati. The judgment debtors, however, remained in possession of the property, and in 1904, Musammat Bhagwati brought the present suit to recover possession from them. The defence to the suit was, amongst others, that section 244, Code of Civil Procedure, barred the suit. The court of first instance (Munsif of Amroha) sustained this plea and dismissed the suit, and this decree was on appeal affirmed by the Subordinate Judge of Moradabad. The plaintiff thereupon appealed to the High Court.

Upon the appeal coming on for hearing before STANLEY, C. J., and BANERJI, J., on May 16, 1908, it was referred to a Full Bench.

Before the Full Bench:

Munshi *Gokul Prasad*, for the appellant. The question is whether the suit is barred by section 244 (*c*), Code of Civil Procedure. There is no question of stay here. There are two essential points to consider, (1) whether the question is between *parties to the suit* and (2) whether it is one relating to the *execution, satisfaction or discharge* of the decree. Even though the question may relate to *execution, satisfaction* or *discharge*, section 244 will not apply if the question does not arise between the *parties to the suit*, that is, the judgment debtor or his representatives on the one side, and the decree-holder or his representatives on the other. A question between two judgment-debtors *inter se* or a judgment-debtor and his representative, as is the case here, does not come within the purview of this section. *Raynor* v. *Mussoorie Bank, Limited* (1), *Gour Mohun Gouli* v. *Dinonath Karmokar* (2), *Maganlal Mulji* v. *Doshi Mulji* (3), *Ram Saran Pande* v. *Janki Pande* (4) and *Bakhtawar Lal* v. *Baru Mal* (5).

Secondly, the decree was for sale; after the sale had been carried out and confirmed the decree was fully executed, and it mattered nothing to the decree-holder whether the auction-purchaser got possession or not. The auction purchaser must come in under sections 318 and 319, Code of Civil Procedure, and it is well settled that an order under any one of those sections is

(1) (1885) I. L. R., 7 All., 681, 686. (3) (1901) I. L. R., 25 Bom., 631, 635.
(2) (1897) I. L. R., 25 Calc., 49, 52. (4) (1895) I. L. R., 19 All., 106.
(5) (1907) 4 A. L. J. R., 492, 494.

not appealable. *Narain Singh* v. *Pargash* (1), *Dhunda* v. *Durga*, (2), *Ghulam Shabbir* v. *Dwarka Prasad* (3), *Siddo Kunwar* v. *Bansidhar* (4), *Luchmee Narain* v. *Bhairow Pershad* (5), *Bhimal Das* v. *Ganesha Koer* (6) and *Mahomed Mosraf* v. *Habib Mia* (7).

Now a decree-holder who has purchased at auction occupies, in the eye of the law, the same position as an independent purchaser does. *Mahabir Pershad Singh* v. *Macnaghten* (8).

The fact that the decree-holder has purchased is a mere accident. *Sabhajit* v. *Sri Gopal* (9).

Article 138, schedule II, Indian Limitation Act, also favours the contention that a suit like the present is maintainable. If the law gives concurrent remedies, a person may elect to adopt the one he prefers. There is no bar to such a suit.

Kalian Singh v. *Thakur Das* (10), proceeds on two grounds, *viz.*, that the auction-purchaser is a representative of the judgment-debtor, and that, according to the Privy Council, section 244 must be liberally construed. In this view the case does not affect the present question, as it is contended that the question must arise between the judgment-debtor or his representatives and the decree-holder or his representatives arrayed on opposite sides. In *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (11) it was admitted that the question related to the execution, discharge and satisfaction of the decree, and that it was sought to set aside the sale on the ground of *fraud.*

Delivery of possession is an extraneous incident of the sale. The case of *Madhusudan* v. *Gobinda Pria* (12) is difficult to reconcile with the later cases of the same Court, *e g.*, in 1 C. W N., 658. and in 6 C. L. J., 749. *Kasinatha Ayyar* v. *Uthumansa Rowthan* (13), was a case in which the terms of the decree in that particular case were in question and the decision must be taken as confined to the facts therein, as observed in *Quinn* v. *Leathem* (14). *Kattayat* v. *Raman* (15) was decided apparently on the

(1) Weekly Notes, 1886, p 45.
(2) Weekly Notes, 1893, p 123
(3) (1895) I. L. R, 8 All., 36.
(4) (1901) I L. R, 23 All, 476, 477.
(5) (1866) N.-W. P., H C. Rep, 1866, Misc Ap. 5
(6) (1897) 1 C. W. N., 653.
(7) (1904) 6 C. L. J., 749.
(8) (1889) I. L. R, 16 Calc, 682, 692.
(9) (1894) I L. R., 17 All., 224, 225.
(10) Weekly Notes, 1906, p 87.
(11) (1892) I. L. R, 19 Calc., 683.
(12) (1899) I. L. R., 27 Calc., 34, 37.
(13) (1901) I. L. R., 25 Mad, 529.
(14) (1901) A. C., 495, 506, Per Lord Halsbury, L. C.
(15) (1902) I. L. R, 26 Mad., 740.

1908

BHAGWATI v. BANWARI LAL.

principle of *stare decisis*. *Sandhu Taraganar* v. *Hussain Sahib*, (1), *Manickka Odayan* v. *Rajagopal Pillai* (2), *Sheo Narain* v. *Nur Muhammad* (3), and *Bhani Mal* v. *Makkhan Lal* (4) are authorities to the contrary, but it is submitted that the principle of these rulings is opposed to the accepted intrepretation of, and is not warranted by, the language of section 244, which is very clear in itself.

Mr. *B. E.* O'Conor, for the respondents. The tendency of all the courts, since the Privy Council has so held, has been to relegate such questions as have arisen in the present case to section 244 in order to ensure expeditious determination of them. The cases cited from the Madras reports only emphasize that view, and it is certainly in the interests of all parties, inasmuch as determining such questions under section 244 means so much cheapness. It is submitted that the decree-holder by becoming auction-purchaser does not lose his character of decree-holder—one cannot disembody the man. He remains decree-holder all the same. In the case of an independent auction-purchaser the distinction is that he has never been a party to the suit, but the decree-holder has been one all along up to the date of sale. There can be no valid reason why at the time of delivery of possession he should figure as somebody else. The auction-sale cannot be regarded as the point of cleavage.

In the cases of *Madhusudan* v. *Gobinda Pria* (5) and *Kesri Narain* v. *Abul Hasan* (6) application for delivery of possession has been regarded as an application for execution of the decree.

Again *Moti Lal.* v. *Makund Singh* (7) holds that an application by a decree-holder to be put into possession of property he has purchased at auction is a "step in aid of *execution*." It is submitted that these cases go to show that the decree for sale is not complete until in accordance with it the purchaser is also put in possession. It is, therefore, submitted that when a decree-holder seeks to recover possession upon his failure to get it, his remedy is under section 244. The cases in I. L. R. 28 Mad, 87, and in I. L. R., 30 Mad., 507, favour this contention. Article 138, sch. II, Limitation Act, regulates the period of limitation, and its

(1) (1904) I. L. R., 28 Mad., 87.
(2) (1907) I. L. R., 30 Mad., 507.
(3) (1907) I. L. R., 30 All., 72.
(4) (1908) 5 A. L. J. R., 285.
(5) (1899) I. L. R. 27 Calc., 34, 37.
(6) (1904) I. L. R., 26 All., 365, 367.
(7) (1897) I. L. R., 19 All., 477, 479.

provision cannot control section 244 of the Code of Civil Procedure which regulates the remedies open to the decree-holder and the judgment-debtor.

Gokul Prasad, in reply, referred to the observation of STANLEY, C. J., in *Gulzari Lal* v. *Madho Ram* (1), as to the character of a purchaser at auction.

STANLEY, C.J.—The facts of this case as found by the lower appellate court are as follows:—In execution of a mortgage decree obtained by one Musammat Mohini against one Shankar Lal, the interest of the latter in certain property was sold and purchased in the name of the defendant Bansidhar as a *benamidar* for the decree-holder Musammat Mohini. On the 27th of November 1897 the sale certificate was issued to Musammat Mohini and she by a *tamliknama*, dated the 20th of September 1900, transferred her interest to her daughter-in-law, the plaintiff Musammat Bhagwati. Bansidhar, the nominal purchaser, purported to resell the property to the defendant Ganga on the 27th of July 1897, and Ganga purported again to sell it to Musammat Mohini, but these last-mentioned sales may be left out of consideration as it is admitted by both Bansidhar and Ganga that Musammat Mohini was the real purchaser. The representatives of the mortgagor were in possession of the property at the date of the sale and they or their transferees have remained in such possession up to the present time. The suit out of which this appeal has arisen was instituted on the 1st of September 1904, that is, about seven years after the date of the sale, for the recovery of possession of portion of the property, the subject-matter of the sale. Both the lower courts have held that the suit is barred by the provisions of section 244 of the Code of Civil Procedure.

In consequence of the conflict of authority in this Court on the question involved in the case, this appeal has been laid before a Full Bench. Section 244 prescribes that all questions arising between the parties to a suit, or their representatives, relating to the execution, discharge or satisfaction of a decree, shall be determined by the court executing the decree, and not a by separate suit. Two questions must be answered in the affirmative before we can

(1) (1904) I. L. R., 26 All., 447, 453.

1905

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

hold that section 244 applies to this case, namely (1) *is a mortgagee, who in a suit for sale upon his mortgage applies to the court for and obtains leave to bid and buys the mortgaged property, amenable to the provisions of* section 244, and (2) is the plaintiff a representative of the decree-holder Musammat Mohini within the meaning of the expression 'representatives' as used in the section?

To take the first question, the argument in support of a negative answer to it was that as auction-purchaser the decree-holder Musammat Mohini occupied a different character from that of decree-holder, and that *quá* purchaser she was not a party to the suit, and therefore no question touching the execution of the decree arose between the parties to the suit or their representatives. It is said that it was a mere accident that the decree-holder became the purchaser and that she must be held to occupy the position of a purchaser who had no connection whatever with the suit. It was further contended that the proceedings in the suit determined so soon as the sale was confirmed and that delivery of possession was outside and beyond the scope of the suit, and therefore it was not open to the plaintiff to apply for possession in the execution department and further that in any case the plaintiff was entitled to maintain a separate suit for possession.

I fail to see how the purchase by a decree-holder mortgagee of the mortgaged property can be properly described as an accident. In no way, as it appears to me, can a purchase of the kind be regarded as a mere accident. In the first place a mortgagee decree-holder is not permitted to bid at a sale held in execution of his own decree save with the leave of the Court. The obtaining of such leave is a deliberate act on his part. Then again the making of the highest bid is a deliberate act, and in no true sense, therefore, can a purchase of the kind made by a mortgagee be regarded as accidental. The observation of LORD WATSON in *Mahabir Pershad Singh* v. *Macnaghten* (1), that "leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser" is relied on as establishing a dual character in a

(1) (1889) I. L. R., 16 Calc., 682.

decree-holder purchaser according to which he may for one purpose lay aside his legal obligations as a party to the suit while he retains his rights and privileges in other respects. I do not think that LORD WATSON intended to lay down any such proposition. What I understand by his language is simply this, that the rule which forbids a mortgagee decree-holder to purchase has no force if permission to bid be given to him by the Court, and that when the grant of permission to bid has been given, such mortgagee is no longer under disability to purchase, but *quâ* the right to purchase is on the same footing as strangers to the suit who may be bidders at the sale.

It was suggested during the argument that a mortgagee who purchases at a sale held in execution of his own decree, occupies a dual character, such as that which is held by an executor or trustee, and that as purchaser he is not also decree-holder and so cannot be regarded as a party to the suit so as to be bound by the provisions of section 244; that, in other words, a question arising between him and the mortgagor judgment-debtor in regard to delivery of possession is not a question arising between the parties to the suit within the meaning of the section. The argument appears to be, that when a sale to a decree-holder mortgagee has been confirmed the decree-holder entirely drops the character of decree-holder and assumes that of purchaser and that any question touching the delivery of possession of the purchased property is not a question between the decree-holder and the mortgagor in possession but is a question between the purchaser only, independently of the character of decree-holder and the mortgagor. The recognition of such a dual personality in a decree-holder purchaser would be, I think, to introduce a strange and novel legal fiction into our jurisprudence. It has been said, and rightly said, that an executor, who is sued as such only, cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. In order that he may be personally bound he must be sued in his personal as well as in his representative capacity. There is, however, in my opinion no analogy between the two cases. An executor not merely claims title from a deceased person, but he represents the deceased person. If he institute a suit in

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

respect of the estate of the deceased, he does so not presumably for his own benefit but for the benefit of the estate of the deceased. If he be sued as an executor only he is sued as representing the deceased. On the contrary, in the case of a decree-holder he sues on his own behalf and for his own benefit. If he get leave to bid and buys the mortgaged property, he does so on his own account and in his own interest alone. I am unable therefore to see how the character of the decree-holder can be split up into two distinct characters so as to enable him to override the provisions of section 244. By becoming a purchaser he does not cease to be a party to the suit and as such to be bound by any order which may be passed therein. The intention of the Legislature in passing the enactment in question was, as it seems to me, to prevent any question which could be disposed of in execution becoming the cause of fresh litigation —see *Viraraghava* v. *Venkata* (1) and *Muttia* v. *Appasami* (2).

But we have further to see whether the obtaining of possession by a mortgagee decree-holder, who purchases at a sale in execution of his own decree, is a proceeding in execution within the meaning of section 244. The mortgagees were at the time of the sale, and are stil, in possession of the mortgaged property. Is a mortgagee decree-holder who buys the mortgaged property bound to apply to the Court for delivery of possession within the period prescribed for such step, that is three years, or is he entitled to remain quiescent for a period less than twelve years by a day and then institute a suit for possession? A sale of property is not complete until the vendor has delivered to the purchaser such possession as he is able to give. One of the liabilities of the seller is to give to the buyer on being so required such possession of the property as its nature admits (section 55 of the Transfer of Property Act, 1882). Delivery of possession was necessary in this case to render the sale ordered by the Court final and complete, and was therefore, I think, a step in aid of execution. It is said that upon the confirmation of the sale there was nothing more to be done by the Court,

(1) (1882) I. L. R., 5 Mad., 217. (2) (1890) I. L. R., 13 Mad., 504.

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

but I am unable to accede to this proposition. The delivery of possession is undoubtedly to my mind a step in aid of execution. This was so held in the case of *Moti Lal* v. *Makund Singh* (1). In that case EDGE, C.J., and BLAIR, J., in their judgment observed :—"A proceeding in execution cannot be said to be completed (at least so far as the decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree. Consequently it appears to us that an application to be paid out of Court the proceeds of such sale must be considered as the taking of a step in aid of the execution of the decree." And further on :—"The execution of his (the decree-holder's) decree cannot be said to be satisfied until in the one case he has received the purchase money paid into court, and in the other case until he be put into possession of the property of his judgment-debtor which he has purchased and which represents money." This ruling was followed in the case of *Muttia* v. *Appasami*, which I have already cited. In that case a decree-holder purchaser applied under section 318 of the Code of Civil Procedure for delivery of the property purchased by him, which was in the occupancy of the judgment-debtor. The judgment-debtor set up an agreement between him and the applicant in bar of the application. MUTTUSAMI AYYAR, J., in the course of his judgment observed :—"When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of section 244." In *Sariatoolla Molla* v. *Raj Kumar Roy* (2), MACLEAN, C. J., and BANERJI, J., held that an application by a decree-holder to be put into possession of property which he had purchased under execution proceedings is an application in aid of execution within the meaning of sub-section (4) of article 179 of schedule II to the Limitation Act. The ruling of this Court in the case of *Moti Lal* v. *Makund Singh* was approved of. In the case of *Kattayat Pathumayi* v. *Raman Menon* (3), a decree-holder became purchaser of immovable property which was sold in execution of his decree. He applied under section

(1) (1897) I. L. R., 19 All., 477. (2) (1900) I. L. R., 27 Calc., 709.
(3) (1902) I. L. R., 26 Mad., 740.

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

318 of the Code of Civil Procedure for delivery of possession of the property purchased, but his application was rejected as barred by limitation, having been made more than three years after the confirmation of the sale. He then brought a suit to recover possession of the land from the judgment-debtor. It was held, following several other decisions of the Madras and Calcutta High Courts that the proceedings taken by the purchaser to obtain possession of the property purchased related to the execution, discharge or satisfaction of the decree within the meaning of section 244, and the suit was therefore dismissed. I do not think it necessary to cite further authorities for this proposition. It is supported by the rulings in the following cases:—*Har Din Singh* v. *Lachman Singh* (1), *Kasinatha Ayyar* v. *Uthumansa Rowthan* (2), *Ram Narain Sahoo* v. *Bandi Pershad* (3), *Sindhu Taraganar* v. *Hussain Sahib* (4), *Sheo Narain* v. *Nur Muhammad* (5).

According to my view, when a Court has passed a decree for sale in a mortgage suit the proceedings are not at an end when the sale to the decree-holder who has obtained liberty to bid has been confirmed and a certificate of sale granted. In such a case, if the mortgagor is in possession, it is the right of the purchaser to ask for and the duty of the Court to grant an order for delivery of possession to him. Until such possession has been given the decree cannot be said to have been executed or satisfied. In England any party to an action in which a sale has been directed who is in possession of the estate may be ordered by the court to deliver up such possession to the purchaser and the court will enforce such delivery of possession by a writ of possession: Order 51, Rule 1, Rules of the Supreme Court. Section 318 of the Code of Civil Procedure similarly provides that when property sold is in the occupation of the judgment-debtor and a certificate has been granted under section 316, the Court shall on application by the purchaser order delivery to him of the purchased property. Here the decree-holder made the purchase in order to satisfy her debt, and so long as the land remains in the possession of the mortgagors the debt to the extent of the price

(1) (1900) I. L. R., 23 All. 343.
(2) (1901) I. L. R., 25 Mad., 120.
(3) (1904) I. L. R., 31 Calc., 737.
(4) (1904) I. L. R., 28 Mad., 87.
(5) (1907) I. L. R., 30 All., 72.

cannot be said to have been satisfied. The fallacy of the argument advanced on behalf of the appellants lies as it appears to me in the assumption that on the grant of the certificate of sale the decree was "completely executed and satisfied." The decree was not, I think, satisfied so long as possession was withheld by the mortgagors from the decree-holder. I may point out that when a decree in a mortgage suit is not wholly satisfied by the proceeds of a sale, proceedings in the suit must be continued if the decree is to be wholly satisfied.

During the argument a suggestion was thrown out that article 138 of schedule II to the Limitation Act supported the appellant's contention. This article allows a period of 12 years to a purchaser of land in execution of a decree within which to bring a suit for possession of the purchased property when, as here, the judgment-debtor was in possession at the date of the sale. This article, it was suggested, was inconsistent with the view expressed in the case of *Sheo Narain* v. *Nur Muhammad*. It seems to me that it in no way supports the appellant's contention. A general provision of the kind cannot override the special provisions of section 244. The article in question may be applicable to the case of a purchaser who was a stranger to the suit in which a decree for sale is passed, and who, not being a party to the suit, is not entitled to take proceedings under section 244, but it can in no way, I think, be regarded as controlling the operation of section 244. The conclusion at which I have arrived therefore is that if a mortgagee decree-holder obtain leave to bid at a sale held in execution of his own decree and becomes the purchaser, he must obtain possession from the mortgagor in possession in the execution department and not by an independent suit.

My brother BANERJI rightly observed in the case of *Gulzari Lal* v. *Madho Ram* (1) that "the trend of recent decisions, both of the Privy Council and of the Courts in this country is in favour of placing on section 244 as wide an interpretation as is compatible with its provisions, so that questions which may be determined by the court executing a decree should not be made the subject of a separate suit." To hold contrary to the view which I have expressed would be not merely to narrow the

(1) (1904) I. L. R., 26 All., 447, 453.

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

interpretation to be placed on that section but also to overrule a decision of a Division Bench of this Court and of a Division Bench of the Calcutta High Court and several decisions of the Madras High Court, as well as the ruling in *Moti Lal* v. *Mukund Singh* and the rulings which follow it. On the principle of *stare decisis*, even if there be any doubt as to the propriety of those decisions, I should hesitate to unsettle the law on the question decided by them.

This brings me to the remaining question in the appeal. The plaintiff in this case is not a decree-holder but a donee from the decree-holder. Is she a representative of the decree-holder within the meaning of section 244? I have little or no doubt that she is. It has been held, and I think rightly, that the assignee of a decree-holder purchaser at an auction sale is a representative within the meaning of that expression in section 244. *Sandhu Taraganar* v. *Hussain Sahib* (1); also *Dwar Buksh Sirkar* v. *Fatik Jali* (2). I see no reason for placing a donee of a decree-holder in a higher position than an assignee for value. The word "representatives" appears to me to include a party who by assignment or gift succeeds to the rights of the decree-holder after decree.

I would therefore answer the second question in the affirmative and would for the reasons which I have given dismiss the appeal.

KNOX, J.—The facts found in the appeal are as follows:—

Musammat Mohini as plaintiff obtained a decree for the sale of certain property. In execution of that decree she brought the property to sale and it was purchased by one Bansidhar on the 16th of November 1894. Bansidhar professed to sell the property under a sale-deed dated the 30th of November 1894, to one Gangadhar. Gangadhar professed to sell it to Musammat Mohini the plaintiff. The real purchaser, however, was Musammat Mohini, the decree-holder, and she, on the 27th of November 1897, applied for and obtained the sale certificate. Musammat Mohini, on the 20th of September 1900, executed a *tamliknama* whereby she transferred this property to Musammat Bhagwati, the present plaintiff.

(1) (1904) I. L. R., 28 Mad., 87. (2) (1898) I. L. R., 26 Calc., 250.

Musammat Bhagwati, on trying to obtain possession of the property conveyed to her, found herself opposed by Banwari Lal, son of Shankar Lal, who was judgment-debtor in the decree obtained by Musammat Mohini, in pursuance of which, as already stated, a portion of the house was brought to sale and purchased by Musammat Mohini. She accordingly instituted an ordinary suit for dispossession of Shankar Lal and other persons, who, she alleged, were in collusion with him in refusing to deliver possession. All the defendants, except certain *pro formâ* defendants, put forward as an answer to the plaintiff's claim, that she was a representative of the decree-holder and that as she did not obtain possession of the property purchased within three years, she was not entitled to file the suit and that section 244 of the Code of Civil Procedure operated as a bar. The court of first instance holding that the suit was barred by section 244, dismissed it. The lower appellate court, also taking the same view, held that the suit was barred.

Section 244 lays down that questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof shall be determined by order of the court executing a decree and not by separate suit.

It has been held by a Full Bench of this Court, *Gulzari Lal* v. *Madho Ram* (1) following a Full Bench judgment of the Calcutta High Court, *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (2), that the term "representative" as used in section 244 of the Code of Civil Procedure does not mean only the legal representative of a judgment-debtor, *i.e.* his heir, executor or administrator, but that it means his representative in interest, and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree. In this case my brother BANERJI held, and I think rightly, that every purchaser of the judgment-debtor's interest, who is bound by the decree, is a representative of the judgment-debtor within the meaning of the section, whether he is a purchaser under a private sale from the judgment-debtor or a purchaser at a

(1) (1901) I. L. R., 26 All., 447. (2) (1896) I. L. R., 24 Calc., 62.

1908

BHAGWATI v. BANWARI LAL.

Knox, J.

compulsory sale, held in execution of a decree obtained against the judgment-debtor. He could see no distinction in principle between the case of a purchaser at a private sale and that of an auction-purchaser provided that the decree in execution could be enforced against him.

By a similar process of reasoning it appears to me that a donee from a decree-holder, if he, should the necessity arise, can enforce the decree in the execution sale, should be held to fall within the category of *representatives of a decree-holder* for the purpose of section 244 of the Code.

The object of that section, *it* appears to me, was to provide for the speedy determination of any question between the decree-holder and the judgment-debtor, should any still be left at such a late stage of the litigation between them. A decree-holder who has fought out his case, won his decree and carried it possibly into several courts of appeal and who elects to buy the property of his judgment debtor which he has put up to auction, ought to be in a position to know all that need be known about the property. *He had ample means in the* suit and under the procedure which regulates execution to find out all that need be known. *It is* to the interest of all *that the litigation should* be put *to* an end. *Section 244* places the representative in the same position as the decree-holder, and I see no advantage in prolonging the strife by giving the decree-holder who has become purchaser a second capacity.

The learned Chief Justice has gone very fully into the remaining questions raised in the appeal and I do not see that I can with advantage add any thing to what he has said upon these points beyond saying that I agree with what has been said upon them.

Agreeing with the learned Chief Justice, I would dismiss this appeal.

BANERJI, J.—The question raised in this appeal is whether a suit by an auction-purchaser or his representative against the judgment-debtor or his representative for possession of the property sold is barred by the provisions of section 244 of the Code of Civil Procedure.

The facts are these: One Musammat Mohini obtained, on the 12th of March 1891, a decree for the sale of certain hypothecated property against Shankar Lal, the father of the first defendant. In execution of that decree she caused the property, which consisted of a house and lands, to be sold by auction on the 10th of November 1894 and purchased it herself in the name of one Bansidhar. The proceeds of the sale were sufficient to satisfy the decree in full. Bansidhar sold the property to Gangadhar, the son of Mohini, and Gangadhar sold it to Mohini, who obtained a certificate of sale on the 27th of November 1897. Subsequently, on the 20th of September 1900, she made a gift of the property to her daughter-in-law, the plaintiff. As possession was withheld from the plaintiff she brought the present suit against the legal representatives of the judgment-debtor on the 1st of September 1904. The property claimed being a share of a house and land, other co-sharers in it were made defendants *pro formâ*. The main defence to the suit was that it was barred by the provisions of section 244 of the Code of Civil Procedure and that the plaintiff's remedy was an application for possession under section 318 of the Code. This contention prevailed in the court of first instance, which dismissed the suit. The decree of that court having been affirmed by the lower appellate court, the present appeal has been preferred by the plaintiff. It is urged on her behalf that section 244 is no bar to the suit and that she had no remedy under that section.

There cannot be any doubt that the purchaser of immovable property at an execution sale which has been confirmed is entitled to obtain possession of the property. If it is in the occupancy of the judgment-debtor or his tenants, the auction purchaser may apply for delivery of possession under section 318 or section 319, as the case may be. Is a question which arises under either of those sections a question which may be determined under section 244? If it is so, no separate suit will lie. The only clause of that section which can be applicable is clause (c). In order that clause (c) may apply two conditions are essential: first, that the question arises between the parties to the suit in which the decree was passed or

1908

BHAGWATI v. BANWARI LAL.

Banerji, J.

their representatives; and second, that it is a question relating to the execution, discharge, or satisfaction of the decree. As regards the first condition it is manifest that the parties must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of section 244. This has been held so repeatedly that I deem it unnecessary to cite authorities. I may refer, however, to the cases of *Raynor* v. *The Mussoorie Bank Limited* (1); *Maganlal* v. *Doshi Mulji* (2), in which it was held that a dispute between the judgment-debtor and his own representative is not a question which may be determined under section 244; and *Gour Mohun* v. *Dinanath* (3), in which the Calcutta High Court held that the section does not apply when a question arises as to the execution of a decree between two persons each of whom claims to be the representative of the decree-holder.

It was held by a Full Bench of this Court in *Gulzari Lal* v. *Madho Ram* (4) that an auction-purchaser of the interests of the judgment-debtor, who is bound by the decree, is his legal representative within the meaning of section 244. Therefore, when a question arises between the judgment-debtor and the auction-purchaser of his interests it is a question between the judgment-debtor and his representative and is consequently not a question which may be determined under that section. The basis of the decision in *Kalian Singh* v. *Thakur Das* (5), namely, that the auction-purchaser being the representative of the judgment-debtor, section 244 applies cannot in my humble judgment be held to be sound. It is contended that the fact of the decree-holder being the auction-purchaser makes a difference and that when such a purchaser applies for delivery of possession the question is one between the parties to the suit. I am unable to accede to this contention. The decree-holder as such is not entitled to possession, as

(1) (1885) I. L. R., 7 All., 681.
(2) (1901) I. L. R., 25 Bom., 631.
(3) (1896) I. L. R., 25 Calc., 49.
(4) (1904) I. L. R., 26 All., 447.
(5) 3 A. L. J. R., 231; S. C., Weekly Notes, 1906, p. 87.

1908

BHAGWATI v. BANWARI LAL.

Banerji, J.

the decree does not award possession. It is only in his capacity as auction-purchaser that he can apply for and obtain possession. In this respect his position is no better and should be no worse than that of any other purchaser. The fact that the decree-holder has purchased the property is, as observed in the Full Bench case of *Sabhajit* v. *Sri Gopal* (1), a pure accident. Although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities, and it is in the latter capacity only that he can obtain possession. It was held by their Lordships of the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (2) that a mortgagee decree-holder who purchases the mortgaged property at auction with the leave of the court is in the same position as any independent purchaser, and sections 318 and 319 of the Code of Civil Procedure make no distinction between a decree-holder auction-purchaser and any other auction-purchaser. I may also refer to article 138 of the second schedule to the Limitation Act, under which a suit may be brought by an auction-purchaser for recovery of possession within twelve years from the date of the auction sale. In that article no distinction is made between different classes of auction-purchasers. I fail to appreciate the reason for holding that if the decree-holder happens to purchase at an auction sale he has a shorter period of limitation for obtaining possession than any other purchaser. In my judgment all auction-purchasers, whether they are decree-holders or not, and whether they purchased under a mortgage decree or under a simple decree for money, are in the same position as regards recovery of possession of the property purchased by them and that it is only in their capacity as auction-purchasers that they can obtain possession. The question, therefore, which arises under section 318 or 319 of the Code of Civil Procedure is not a question between the parties to the suit or their representatives and cannot be determined under section 244. In the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction-purchaser. Under that transfer she acquired no interest

(1) (1894) I. L. R., 17 All., 222. (2) (1889) I. L. R., 16 Calc., 682.

1903

BHAGWATI v. BANWARI LAL.

Banerji, J.

in the decree itself and in no sense can it be said that she is the holder of the decree or the representative in interest of the decree-holder *quâ* the decree. Even, therefore, if it be assumed that a distinction exists between the case of a decree-holder purchaser and any other purchaser (though in my judgment no such distinction exists) that distinction cannot be held to apply in the present suit.

I am further of opinion that a question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to delivery of possession is not a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of section 244, clause (c). Upon the judgment-debtor's property being sold and the amount due under the decree being realized the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction purchaser obtains possession of the property sold is wholly immaterial for the purposes of the decree and does not in any way affect it. If the decree-holder purchases the property but does not obtain possession, that circumstance would not entitle him to take out execution of the decree, which has already been satisfied. So long as the sale subsists he cannot claim a refund of the purchase money or ask for execution of the decree to the extent of the amount of the purchase money. It is only when an auction sale has been set aside under section 310A, 312 or 313, that the purchaser may under section 315 obtain a refund, but he is not entitled to a refund if he fails to obtain possession of the property sold. In this respect also the position of the decree-holder purchaser is not different from that of any other purchaser. It is said that an auction sale is not complete until possession has been delivered to the auction-purchaser. I see no warrant in the Code of Civil Procedure for such a view. Under section 314 a sale becomes absolute as soon as it is confirmed, and under section 316 the property vests in the purchaser from the date of confirmation of sale. The purchaser may, no doubt, obtain delivery of possession by an application under section 318 or 319, but the validity of the sale or the completion of it does not depend on his obtaining possession. I am also unable to hold

that if the decree-holder happens to be the auction-purchaser the property purchased by him may be regarded as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold and it is the amount of this purchase money which the decree-holder obtains as the fruits of the decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money, and he may do so, either in cash or by setting it off against the amount of his decree. In the present case the property was sold for Rs. 400, whereas the amount of the decree was Rs. 87 only. The purchaser had to pay the purchase money in cash and she got the property, not in lieu of the amount of her decree but for a much larger sum. The purchase of the property can, therefore, in no sense be regarded as acquisition of the fruits of the decree, and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and a sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree. Section 88 of the Transfer of Property Act, which lays down what a decree for sale should provide, does not direct that possession should be delivered to the purchaser. So far, therefore, as the purchaser is concerned he does not obtain possession by virtue of the decree and the question of delivery of possession to him is not one relating to the execution, discharge or satisfaction of the decree. That the Legislature intended that a purchaser at auction sale may obtain possession by means of a suit is manifest from article 138 of schedule II of the Limitation Act, to which I have already referred. That article makes no distinction between the case of a decree-holder purchaser and that of any other purchaser. I can find no legitimate reason for holding that if a decree-holder happens to purchase the judgment-debtor's property he should be in a worse position than any other purchaser. I am, therefore, of opinion that a decree-holder auction-purchaser, like any other auction-purchaser, is entitled to claim possession, not only by an application under section 318 or section 319, but also by suit; that he has alternative remedies, one of the remedies being a

1908

BHAGWATI v. BANWARI LAL.

summary application for possession, and that section 244 is a bar to such a suit and does not apply to such an application.

The course of rulings in this Court has, until recently, be to the effect that there is no appeal from an order under section 318 and that such an order is not one under section 2 In *Narain Singh* v. *Pargash* (1), *Dhunda* v. *Durga* (*Ghulam Shabbir* v. *Dwarka Prasad* (3) and *Baboo Luchm Narain* v. *Baboo Bhairow Pershad* (4) it was held that appeal lies from an order for delivery of possession to an aucti purchaser. The same view was taken by the Calcutta Hi Court in *Bhimal Das* v. *Ganesha Koer* (5) and *Mahomed Mosr* v. *Habib Mia* (6). The contrary opinion was expressed in t Court in *Kalian Singh* v. *Thakur Das* (7), to which I have ready referred. That was a very unfortunate case. The pla tiff as purchaser at an auction sale held in execution of a mo gage decree applied for delivery of possession under section 3 The court of first instance rejected his application as time-barr On appeal the District Judge held that the application was beyond time. From his decision an appeal was preferred to High Court, being First Appeal from Order No. 50 of 18 The High Court held on 6th August 1898 that no appeal lay the District Judge and restored the order of the court of fi instance. Thereupon the auction-purchaser brought a suit possession and obtained a decree in the courts below. The Hi Court on appeal held that the suit was not maintainable and w barred by the provisions of section 244 of the Code of Ci Procedure. The reason for this decision was, as I have point out above, that, according to the decision of the Full Bench *Gulzari Lal* v. *Madho Ram* (8), the auction-purchaser w the representative of the judgment-debtor within the meani of section 244 and that the aforesaid section was therefo applicable. The learned Judges, as it appears to me, omitted give effect to the consideration that the auction-purchaser bei the representative of the judgment-debtor the question was o

(1) Weekly Notes, 1886, p 45.
(2) Weekly Notes, 1893, p. 122.
(3) (1895) I. L. R., 18 All., 20.
(4) N.-W. P., H. C. Rep., 1866, Misc. Ap., 5.
(5) (1897) 1 C. W. N., 658.
(6) (1904) 0 C. L. J., 749.
(7) 3 A. L. J. R., 234; S. C., Week Notes, 1906, p. 87.
(8) (1904) I. L. R., 26 All., 447.

between the judgment-debtor and his representative and did not therefore come within the purview of section 244. With great deference, therefore, I am unable to follow this ruling. The same view was held by the same learned Judges in *Sheo Narain* v. *Nur Muhammad* (1) reversing the decision of my brother AIKMAN in that case, reported in I. L. R., 29 All. 466. The case of *Kalian Singh* v. *Thakur Das* was referred to and followed, and reference was also made to two recent decisions of the High Courts at Calcutta and Madras and to the decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2). The case in the Calcutta High Court which was referred to is that of *Madhusudan Das* v. *Gobind Pria Chowdhurani* (3), but that case is irreconcilable with the decision of the same Court in the earlier cases of *Seru Mohun Bania* v. *Bhagoban Din Pandey* (4) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (5) and was not followed in the recent case of *Mahomed Mosraf* v. *Habib Mia* (6). In the case last mentioned the purchaser was the decree-holder and the assignee from him applied for possession under section 318. It was held by BRETT and MOOKERJEE, JJ., that section 244 did not apply and no appeal lay. The case of *Madhusudan Das* v. *Gobind Pria Chowdhurani* (7) was referred to but was not followed. I may observe that the learned Judges who decided the case of *Madhusudan Das* v. *Gobind Pria Chowdhurani* themselves felt some difficulty in holding that the question related to the execution, discharge or satisfaction of the decree and they did not refer to the earlier rulings on the point. In *Kattayat Pathumayi* v. *Raman Menon* (8), the other case referred to, the learned Judges (BENSON and BHASHYAM AYYANGAR, JJ.,) doubted the correctness of the view they were adopting, but felt themselves bound by previous rulings on the point. The same was the case with *Sandhu* v. *Husain* (9). In that case the learned Chief Justice (SIR ARNOLD WHITE) expressed the opinion that the question could not be regarded as one relating to the execution of the decree. These cases, therefore, so far from supporting the contention of the respondents, are against them. As for the decision

(1) (1907) I. L. R., 30 All., 72.
(2) (1892) I. L. R., 19 Calc., 683.
(3) (1899) I. L. R., 27 Calc., 34.
(4) (1883) I. L. R., 9 Calc., 602.
(5) (1887) I. L. R., 14 Calc., 644.
(6) (1904) 6 C. L. J., 749.
(7) (1899) I. L. R., 27 Calc., 34.
(8) (1902) I. L. R., 26 Mad., 740.
(9) (1904) I. L. R., 28 Mad., 87.

1908

BHAGWATI v. BANWARI LAL.

Banerji, J.

of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), that was a case in which the judgment-debtor sued to set aside a sale on the ground of fraud, the defendant being the decree-holder. It was conceded by counsel that the question was one under section 244 and their Lordships held that it was so. They do not lay down any general rule, but only express approbation of the fact that the courts in India have not placed a narrow interpretation on the provisions of section 244. That ruling does not, in my judgment, justify the application of those provisions to cases which do not fall within their scope and purview. The only other cases to which the learned counsel for the respondent has referred are *Kesri Narain* v. *Abul Hasan* (2), in which my brother KNOX expressed the opinion that an application under section 318 is an application for execution and *Moti Lal* v. *Makund Singh* (3), in which an application for delivery of possession was held to be an application to take a step in aid of execution. For the reasons I have already stated I am unable to agree with those decisions.

In my judgment the plaintiff's suit is not barred by the provisions of section 244 of the Code of Civil Procedure. I would, therefore, allow the appeal and setting aside the decree of the lower appellate court, remand the case to that court for trial of the other questions which arise in the case.

AIKMAN, J.—The question for decision by this Full Bench is whether a decree-holder who has purchased property at a sale in execution of a decree for money or the assignee of such a decree-holder can maintain a suit against the judgment-debtor or his representative for possession of the property, or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure.

There is no doubt that a purchaser of property sold in execution of a decree for money, whether he be the decree-holder himself or an outsider, can, after he has got a certificate under section 316 of the Code, apply to the Court under section 318 to be put in possession. If for some reason he fails to get possession in this way within three years from the date or grant of the certificate, there is equally little doubt that a purchaser, other

(1) (1892) I. L. R., 19 Calc., 683. (2) (1904) I. L. R., 26 All., 305.
(3) (1897) I. L. R., 19 All., 477.

than the decree-holder, is allowed a period of twelve years under article 137 or 138 of the Limitation Act within which he may bring a regular suit for possession of the property he has bought. I would remark in the first place that there is nothing in the language of these articles which would render them inapplicable to decree-holders who have purchased. If it had been the intention of the Legislature that these articles should have no application to suits by decree-holders, one would have expected the articles to run :—'Suit by a purchaser, other than a decree-holder.'

I am unable to see any reason why a decree-holder who happens to have offered a larger amount than any other bidder at a sale in execution of his decree should have only three years *within which to enforce his right to the possession of the property* he has bought, whilst an outside purchaser has twelve.

It must be remembered that it is not in his capacity of decree-holder that a decree-holder purchases property in execution of his decree for money. To use the language of the judgment of five Judges of this Court in the Full Bench case, *Sabhajit* v. *Sri Gopal* (1), it is "a pure accident" that a person who is the holder of the decree is also the auction-purchaser. In the case of both a decree-holder auction-purchaser, and an outside auction-purchaser, the title to the property vests as soon as the sale certificate is issued and not before. The ordinary rule is that a person in whom the title to immovable property has vested can bring a suit for possession thereof at any time within twelve years from the date on which he acquired title. Why should a decree-holder, who happens to have been the highest bidder at a sale, have a shorter period? An independent purchaser would have twelve years within which to enforce his title to the property, and, to use the language of LORD WATSON in the Privy Council judgment in *Mahabir Pershad Singh* v. *Macnaghten* (2), "leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."

In the case of *Rajah Enayat Hossain* v. *Sumeer Chand* (3) the plaintiff Sumeer Chand had bought from a decree-holder property which the latter had purchased at a sale in execution

(1) (1894) I. L. R., 17 All., 222. (2) (1889) I. L. R., 16 Calc., 682, at p. 693.
(3) (1869) 13 Moo., I. A., 366.

1908

BHAGWATI v. BANWARI LAL.

Aikman J.

of his own decree. In the judgment in that case their Lordships say that there is no foundation in principle or authority for the distinction which it was attempted to set up between a person standing in the position of a claimant under an execution sale and a claimant under any other conveyance or assignment. True, the distinction which it was attempted to set up in that case was one in favour of the execution purchaser. Such a purchaser is in no better position than one who takes under any other conveyance. But is there any reason why he should be in a worse? So far I have attempted to show that there is no *a priori* reason why a decree-holder who buys at a sale in execution of his own decree should not have the same right as an independent purchaser to bring a suit to obtain possession. But it is said that section 244 of the Code of Civil Procedure bars any suit by a decree-holder auction-purchaser. If it is clear that the section does bar such a suit, then, however difficult it may be to see why it should, this appeal must fail.

I have had the advantage of reading the judgment of my brother BANERJI in this case and I agree so entirely with the reasons he gives for holding that section 244 does not bar such a suit, that I feel it unnecessary to add much.

Great stress has been laid by learned Judges who have taken a different view on an observation of their Lordships of the Privy Council in I. L. R., 19 Calc., 683, where they say :—"Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section."

This observation must be read with reference to the facts of the case which was before their Lordships, and could never in my opinion have been intended to have the effect of taking away a right of suit, which has never been doubted, at all events in this Court, until recently. It will be seen too, that their Lordships recognise that to bring the question within the purview of section 244 it must, first, be between the parties to the suit or

their representatives, and next, it must relate to the execution, discharge or satisfaction of the decree. I fully agree with the reasoning on which my brother BANERJI bases the conclusion at which he has arrived, namely, that a suit by a decree-holder purchaser, or his assignee fulfils neither of these requirements.

Although the case in I. L. R., 27 Calc., 34, is against the appellant, the learned Judges who decided it admit that 'the matter is not so clear' and there are at least three decisions of that Court which are in favour of the appellant. I refer to the cases in I. L. R., 26 Calc., 529; 1 C. W. N., 653, and 6 C. L. J., 749.

There are decisions of the Madras High Court which are against the appellant. But even in that Court doubt has been thrown on the propriety of these decisions. In I. L. R., 26 Mad., 746, the learned Judges say:—"*If the question was not already* settled by more decisions than one of this Court and of the Calcutta High Court, we should entertain considerable doubt as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as 'relating to the execution, discharge or satisfaction of the decree' within the meaning of section 244, Civil Procedure Code, when such proceedings could not possibly affect the execution, discharge or satisfaction of the decree.

Again in I. L. R., 28 Mad., 87, SIR ARNOLD WHITE, C. J., observed: "If the matter were *res integra*, I should be disposed to hold that the question is not one relating to the execution, discharge or satisfaction of the decree."

There are cases in this and other Courts in which it has been held that an application by a decree-holder purchaser to be put in possession of the property he has bought is an application to the Court to take a step in aid of execution within the meaning of Article 179 of the Second Schedule of the Limitation Act. The learned counsel for the respondents relied on these cases, which do, to some extent, support the view taken by the lower courts in this case. But I agree with my brother BANERJI in doubting the propriety of the view taken in these cases.

An application by an independent purchaser to be put in possession is certainly not an application to take a step in aid of execution, and I do not see why such an application by a decree-holder who has purchased should be deemed to be a step in aid of

1908

BHAGWATI v. BANWARI LAL.

execution. He has got the fruits of his decree when the title to the property vested in him.

With all deference to the learned Judges who have expressed a different opinion, I agree entirely with the judgment of my brother BANERJI and with the order which he proposes to make in this case.

GRIFFIN, J.—In a decree for sale on a mortgage, there is no provision for delivery of possession to the auction purchaser. The Court executing the decree cannot go beyond its terms unless it is expressly empowered by law to do so. Such a power is conferred on the Court by the provisions of sections 318 and 319 of the Code of Civil Procedure. On the facts found in the present case the decree-holder auction-purchaser might have applied to be placed in possession, under the provisions of section 318 and section 319 of the Code of Civil Procedure. If he did not so apply or if his application was unsuccessful, he could, in my opinion, fall back upon his title and sue for possession. That title he derived not from the decree, which, in so far as it was a decree for sale, had expended its force, but from his purchase. Under Article 138 of schedule II to the Indian Limitation Act he could bring his suit within twelve years from the date of the sale. Neither in the Code of Civil Procedure nor in the Indian Limitation Act is there any distinction drawn between a decree-holder auction-purchaser and a stranger auction-purchaser.

I would therefore concur in the order proposed by my brothers BANERJI and AIKMAN.

BY THE COURT.—In view of the decisions of the majority of the Full Bench the order of the Court is that the appeal be allowed and the decree of the lower appellate court be set aside, and, inasmuch as that court decided the case upon a preliminary point and the Court has overruled it upon that point, we direct that the appeal be remanded to the lower appellate court under the provisions of section 562 of the Code of Civil Procedure, with directions that it be reinstated in the file of pending appeals in its original number and be disposed of on the merits, regard being had to the order of the Court in this case. The costs of this appeal will abide the event.

Appeal decreed.

MISCELLANEOUS CIVIL.

1908, December 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

LACHMAN DAS (PETITIONER) *v.* NABI BAKHSH AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 31, 57, 179, 193—*Suit by zamindar for ejectment of tenant and sub-lessee—Appeal—Jurisdiction.*

A zamindar sued to eject one of his occupancy tenants and also certain sub-lessees to whom the occupancy tenant had sub-let part of his holding for building purposes. *Held* that this was a suit falling within section 31 (2) of the Agra Tenancy Act, 1901, and an appeal from the decree therein lay to the Commissioner and not to the District Judge.

THIS was a reference by the District Judge of Saharanpur. The facts of the case appear from the following order.

"In this case a conflict of jurisdiction arises, and as it appears doubtful whether the appeal is cognizable in the Civil or Revenue court and how the appeal is to be disposed of having regard to the provisions of the N.-W. P. Tenancy Act which give rise to the conflict of jurisdiction, I submit the record to Honourable High Court under section 195 of the N.-W. P. Tenancy Act read with section 193 of the Act and 617 of the Civil Procedure Code together with the following statement of the reasons for my doubt.

"The suit in this case was brought under section 57, clauses (b) and (d), and sections 31 and 63 of the Rent Act.

"Plaintiff sued as a zamindar for the ejectment of defendant No. 1, his occupancy tenant, on the ground that defendant No. 1 had sublet his land permanently for building purposes to the remaining six defendants. Defendant No. 1, among other objections, raised the point that the claim was not cognizable by a Revenue Court, but no issue was framed by the Lower Court, and the point was not pressed and no question of jurisdiction was decided.

"On the other hand appellant has also appealed against the amount of compensation, which is a matter which can only be appealed to this court.

"The Honourable High Court is therefore asked for a direction as to which court should entertain this appeal.

* Miscellaneous No 423 of 1907.

1908

LACHMAN DAS v. NABI BAKHSH.

Pandit *Mohan Lal Nehru*, for the appellant.

Mr. *J. Simeon*, for the opposite party.

STANLEY, C.J., and BANERJI, J.—This case has been referred to us by the learned District Judge of Saharanpur under the provisions of section 195 of the Agra Tenancy Act, the learned Judge having doubts as to whether an appeal preferred to him lay in the Civil Court or in the Revenue Court. The suit out of which the reference arises was brought by a landholder against a tenant and sub-lessees from that tenant. The plaintiff's allegation was that the tenant, who is the first defendant, had no power to grant sub-leases to the other defendants, and that by granting the leases the tenant had not only contravened the provisions of the Tenancy Act but had also done an act detrimental to the land and inconsistent with the purpose for which it was let. The suit was described in the plaint as one under sections 57 and 31 of the Tenancy Act. Section 57 of that Act provides that a tenant may be ejected on any of the grounds mentioned in the different clauses of the section. The ground mentioned in clause (*d*) is that the tenant had sub-let or otherwise transferred his holding in contravention of the provisions of the Act. Under clause (*b*) a tenant may be ejected on the ground of any act or omission detrimental to the land in his holding or inconsistent with the purpose for which it was let. If the suit is only against the tenant on the ground specified in clause (*b*) it seems to us that an appeal would lie to the District Judge from the decree of the court of first instance under section 177 of the Act, it being one of the suits included in schedule IV, group B. But where the suit is for ejectment of the tenant and his transferee on the ground mentioned in clause (*d*) of section 57, it is a suit under the second sub-section of section 31 of the Act and is one of the suits mentioned in group C of the fourth schedule. An appeal in such a case lies to the Commissioner under section 179. The question is whether the present suit is one of the description mentioned in group B, No. 13, or in group C, No. 18. In our judgment the suit was one under section 31 (2), being a suit in which the land-holder sued for the ejectment of the tenant and his sub-lessees on the ground mentioned in clause (*d* of section 57. The fact of the sub-lessees being made parties to the

1908

LACHMAN DAS
v.
NABI BAKHSH.

suit clearly indicates that the suit is one of the description mentioned above. It is not a suit for the ejectment of the tenant on the ground of the commission of a breach of condition by a sub lessee or on the ground of any act done or omission made by such lessee, as mentioned in section 64 (1) (a). Therefore the only section under which the suit in this case could be brought, and was brought, was section 31 (2). An appeal from the decree in the suit lay to the Commissioner.

We find that an appeal was preferred to the Commissioner but he returned the memorandum of appeal on the ground that a question of proprietary title was raised. On this point we are unable to agree with the learned Commissioner, inasmuch as the first defendant, the tenant, never denied his tenancy and never claimed proprietary right in the land within the meaning of section 199 of the Act. What he claimed was that under a custom prevailing in the locality he had a right to transfer his holding. This was not a question of proprietary title and section 199 did not therefore apply. In our judgment the appeal ought to have been heard by the Commissioner, and we accordingly direct that the petition of appeal be returned by the District Judge for presentation in the Court of the Commissioner.

APPELLATE CIVIL.

1908
December 14.

Before Mr. Justice Richards and Mr. Justice Griffin.

GOPAL PRASAD AND ANOTHER (DEFENDANTS) *v.* BADAL SINGH AND OTHERS (PLAINTIFFS) *

Pre-emption—Wajib-ul-arz—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption.

Held that in the case of a suit for pre-emption based upon a contract embodied in the *wajib-ul-arz* the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit. *Janki Prasad v. Ishar Das* (1) and *Ram Gopal v. Piari Lal* (2) distinguished.

THREE suits for pre-emption were filed by the plaintiff Badal Singh against the appellants in respect of three sales, dated 4th May 1906, 27th June 1906, and 27th August 1906, respectively.

* First Appeal No. 91 of 1908 from an order of H. David, Judge of the Court of Small Causes Cawnpore, exercising powers of a Subordinate Judge, dated the 29th of May 1908.

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.

1908

GOPAL PRASAD v. BADAL SINGH.

The defence to all the suits was that the *wajib-ul-arz* on which the suits were based was the record of a contract and that the period of settlement for which it was prepared had expired. The Court of first instance (Munsif of Akbarpur) accepted the defence and dismissed all the suits. On appeal the Subordinate Judge held that the period of settlement had not expired at the dates of the sales nor at the date of the institution of the suits, although it had expired before the suits were decreed, and set aside the decrees of the Munsif and remanded the cases for trial on the merits.

The defendants vendees appealed.

Dr. *Tej Bahadur Sapru*, for the appellants, contended that the pre-emptor must have a subsisting right at the date of the decree and it was not enough that he had a right at the date of sale or the date of institution of suit. He referred to *Janki Prasad* v. *Ishar Das* (1) and *Ram Gopal* v *Piari Lal* (2).

The plaintiff must show that the contract embodied in the *wajib-ul-arz* was still subsisting. Here the *wajib-ul-arz* had ceased to be operative.

Pre-emption was a restraint on alienation and should not be extended beyond the period for which there was a contract. The pre-emptor could not claim the sympathy of the Court or any equity in his favour.

Munshi Govind Prasad, for the respondent, was not called upon.

RICHARDS and GRIFFIN JJ.—This and the connected appeals arise out of pre emption suits. The plaintiff claims on foot of the *wajib-ul-arz*. It has been found by both the courts below that the *wajib-ul-arz* records a contract and not a custom. The court of first instance dismissed the suits upon the ground that the period of settlement for which the *wajib-ul-arz* was prepared had come to an end. The lower court found that the *wajib-ul-arz* was still in existence at the dates of the sales. In the present appeal it has been urged on behalf of the defendants vendees that inasmuch as the settlement, and therefore the contract, had come to end before the time at which a decree could be given, the plaintiff's right to pre-empt must fail. For

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.

the purpose of these appeals it is assumed that the plaintiff had, at the time of the institution of the suits, a right to pre-empt the property by virtue of the contract which is recorded in the *wajib-ul-arz*, and the only question argued here and which we have to decide is whether or not the mere fact that before the date of the decree the period of settlement had determined, prevents the plaintiff from enforcing the right of pre-emption and getting a decree in his favour. The point would be absolutely clear in the absence of authority. The contract was a contract which entitled the plaintiff to purchase if any co-sharer sold his share so long as the contract lasted. It is admitted for the purposes of these appeals that the contract was in full force and effect at the time of the sales. Dr. *Tej Bahadur* on behalf of the appellants, has cited the cases of *Janki Prasad* v. *Ishar Das* (1), and *Ram Gopal* v. *Piari Lal* (2). In both these cases the plaintiff had a right of pre-emption by virtue of the position of his property in the mahal. Before the sale was made partition proceedings had been commenced for the division of the mahal, and before the time for decree had arrived the plaintiff had ceased to be entitled to pre-emption by reason of the division of the mahal in consequence of the partition proceedings. He had ceased to be a co-sharer and the courts held that a decree ought not to be made in his favour, because the principle underlying the right of pre-emption was the keeping out of the stranger. It will be seen that in the cases cited, the plaintiff's position had quite changed during the pendency of the suit. If he had occupied the position at the time of the sale that he occupied at the time of the decree he would have had no right of pre-emption at all. In the present case the plaintiff's right at the time of the decree was exactly the same right as he had at the time of the institution of the suit. In our judgment, the cases cited do not apply and the decision of the court below was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.

1908
December 16.

Before Mr. Justice Richards and Mr. Justice Griffin.

BEHARI BHARTHI (PURCHASER) v. BHAGWAN GIR AND OTHERS (DECREE-HOLDERS).*

Act No. IV of 1882 (Transfer of Property Act), sections 88 and 99—Decree-holder holding a decree for sale on a mortgage and also a simple money decree against the same judgment-debtor—Sale in execution of combined decrees not unlawful.

Where a decree holder holds both a decree for sale on a mortgage as well as a simple money decree against the same judgment-debtor it is not unlawful for him to bring to sale the mortgaged property in pursuance of an application that it may be sold for the realization of the amounts of both the decrees.

THIS was an application to set aside a sale held in execution of a decree. The decree-holders held a mortgage-decree and also a simple money decree against the same judgment debtor. They in execution of their simple money decree attached the property which was subject to the mortgage. They afterwards prayed that the property may be sold in execution of their mortgage-decree, and an order was passed accordingly. Before the sale was held, however, they asked the Court to sell the property for the realization of the combined amounts of both the decrees and the Court granted the prayer. The sale was held on the 11th of November 1907, and the property was purchased by Behari Bharthi, the appellant. The judgment-debtor applied to set aside the sale, and the Subordinate Judge granted the application. The auction purchaser appealed.

Mr. *A. H. C. Hamilton*, for the appellant, contended that a joint sale for the amounts under the simple money and mortgage decrees did not contravene the provisions of section 99 of the Transfer of Property Act. The decree holders had already instituted a suit under section 67. Moreover the objection was not raised at the time of sale and should not be entertained now. He referred to *Gajrajmati Teorain* v. *Akbar Husain*, (1).

The Hon'ble Pandit *Sundar Lal*, for the respondent. The application to set aside the sale was made before confirmation when purchaser's title was not complete. It could only be completed when the sale was confirmed. The sale had taken

* First Appeal No. 40 of 1908, from an order of Maula Bakhsh, Subordinate Judge of Saharanpur, dated the 24th of March 1908.

(1) (1906) I. L. R., 29 All., 196.

Registered No. A 422

VOL. XXXI.] [PART III.



THE INDIAN LAW REPORTS.

MARCH 1909.

(Pages 67—116.)

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REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*

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PAGE.

PRIVY COUNCIL.

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REVISIONAL CIVIL

TABLE OF CASES CITED.

PAGE.

INDEX.

PAGE.

PAGE.

could be maintained unless the whole amount of the mortgage was discharged, and the majority of the Judges constituting the Bench answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in *Ibn Hasan* v. *Brijbhukan Saran* (1) upon which reliance has been placed by the appellants' learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contirbution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of *Ibn Hasan* v. *Ram Dai* (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

BY THE COURT:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1904) I. L. R., 26 All., 407. (2) (1889) I. L. R., 12 All., 110

PRIVY COUNCIL.

P. C.*
1908
November 10

AMMA BIBI AND OTHERS (PLAINTIFFS) *v.* UDIT NARAIN MISRA AND OTHERS (DEFENDANTS).

and 3 other appeals consolidated.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Act No XV of 1877 *(Indian Limitation Act), schedule II, article* 97—*Agreement to sell—Rescission of contract—Act No. IX of* 1872, *(Indian Contract Act, sections* 55, 65—*Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of money paid—Accrual of cause of action*

The defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immovable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. On 10th December 1896 the plaintiff instituted a suit against the defendants for a refund of the money so paid by him, alleging that the defendants had failed to fulfil their part of the contract, which was to execute a conveyance of the property within one month. The defendants denied this, and the first Court, while finding that the period of one month had been fixed by the parties for the execution of the deed of sale, held on the evidence that time was not of the essence of the contract, and that the plaintiff could not (as he claimed) rescind the contract under section 55 of the Contract Act and recover the money he had paid: and this decision was on appeal affirmed by the High Court on 18th January 1900. On 16th April 1900 the plaintiff sued the defendants claiming specific performance of the agreement to sell, or in the alternative for a refund of the money paid by him as part of the consideration for the sale agreed upon. The first Court gave the plaintiff a decree for specific performance. On appeal by the defendants it was held by the High Court on 30th April 1903, (1) that the terms of the agreement to sell not being satisfactorily proved no decree for specific performance could be made; (2) that the plaintiff was therefore entitled to recover the money which he had paid under the agreement; and (3) that, following the case of *Basu Kuar* v. *Dhum Singh* (1), the plaintiff's alternative claim for a refund on failure of consideration was governed as to limitation by article 97 of schedule II of the Limitation Act 1877, and was not barred by lapse of time, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. The plaintiff appealed from the decision of the High Court of 18th January 1900, and the defendants from that of 30th April 1903 to His Majesty in Council, and both

*Present.—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1888) I. L. R., 11 All, 47, L. R., 15 I. A., 211.

appeals were dismissed by their Lordships of the Judicial Committee, who upheld the decisions of the High Court.

FOUR appeals consolidated (Nos 55, 56, 57 and 58 of 1906) from decrees of the High Court at Allahabad. In Nos. 55 and 56 the decrees (18th January 1900) of the High Court affirmed decrees (4th May 1897) of the Subordinate Judge of Gorakhpur; and in Nos. 57 and 58 the decrees (30th April 1903) of the High Court reversed decrees (27th September 1900) of the same Subordinate Judge.

The original plaintiff in all the four suits out of which the appeals arose was one Muhammad Minnat Ulla who is now represented by the appellants in appeals 55 and 56, and the respondents in appeals 57 and 58. On 10th December 1896 Minnat Ulla brought two suits (275 and 276 of 1896) against two separate sets of defendants, of whom the principal was Udit Narain Misra in suit 275 and Rama Shankar Misra in suit 276, those defendants now being respectively the principal respondents in appeals 55 and 56 and the principal appellants in appeals 57 and 58 In both the suits 275 and 276 of 1896 the plaintiff alleged that the defendants had agreed to sell certain property to him on, (among others) the condition that they should execute and register the necessary sale-deeds within a month from the 15th September 1896 the date of the agreements. In accordance with these agreements the plaintiff paid a substantial portion of the consideration for the sales as earnest money in the manner agreed upon. The defendants however did not execute the sale-deeds within the stipulated time, and the plaintiff therefore sued them for a return with interest of the purchase money which had been paid by him in respect of the sales, alleging that the defendants, by omitting to execute the deeds within a month, had failed to carry out their contract. In these suits the Subordinate Judge found on the evidence that one month's time was agreed upon between the parties for the completion of the sale, and in his judgment he said :—

"The plaintiff comes into court on the allegation that the defendants having failed to complete the sale within the specified time of one month, the contract to sell and purchase is at an end and that therefore he is entitled to recover the amount which he has paid for them together with interest thereon. Section 55 of Act IX of 1872, therefore applies to the case and the plaintiff is entitled to rescind the contract if time be found to have been

1908

AMMA BIBI v. UDIT NARAIN MISRA.

of the essence of the contract. In order to determine this I must first refer to the terms of the contract embodied in the petition, Exhibit II. The terms as set forth in the document are as follow :—' That in lieu of the aforesaid amount (Rs. 13,865-6) as well as in lieu of the amount due to Maulvi Minnat Ulla, the defendant would in the course of one month execute and have registered a sale-deed of the four villages specified below in favour of the Maulvi at the rate of Rs. 2-8 per cent. per annum according to the Government roll, and whatever may be found due to the Maulvi after the execution of the sale-deed, the condition of the former deed would hold good and according to the conditions in the old deed the same property would continue hypothecated in the balance of the purchase money and at the time of the execution of the sale-deed, the Maulvi would execute an agreement to reconvey the property sold to the defendant within one year subject to the conditions agreed upon between the parties.' In these terms I find nothing to support the contention that the time of one month is of the essence of the contract. According to the terms of the agreement, the one year for reconveyance is to be reckoned after the execution of the sale-deed, on whatever date it may be executed. It does not appear that the plaintiff had to sustain a substantial loss if the sale was not completed within one month."

And after referring to the cases of *Ram Gopal Mookerjee* v. *Masseyk* (1), *Brojo Soonduree Debia* v. *Collins* (2), *Sooltan Chand* v. *Schiller* (3), *Dadabhoy Dajibhoy Baria* v. *Pestonji Marwanji Barucha* (4) and *Buldeo Doss* v. *Howe* (5), which last case was distinguished from the present, the Subordinate Judge concluded :—

"For the reasons and with regard to the rulings cited above I am of opinion that the time of one month was not of the essence of the contract, and that therefore the plaintiff is incompetent to rescind it."

He dismissed both suits on that ground; and on appeal the High Court (SIR ARTHUR STRACHEY, C. J., and BANERJI, J.) on 18th January 1900 said in affirming that decision—

"We agree with the Court below that there is no reason for the view that time was of the essence of the contract. Upon that view the decision of the Court below is correct and the appeal must be dismissed with costs."

The plaintiffs obtained leave to appeal to His Majesty in Council.

The suits which led to appeals 57 and 58 were on dismissal of the suits 275 and 276 of 1896 instituted in the Court of the same Subordinate Judge on 16th April 1900 being numbered 83 and 84 of that year. The facts with regard to them will be found

(1) (1860) 8 Moo. I. A., 239.
(2) (1870) 13 W. R., 353.
(3) (1878) I. L. R., 4 Calc., 252.
(4) (1893) I. L. R., 17 Bom., 457 (464).
(5) (1880) I. L. R., 6 Calc., 64.

fully stated in the report of the hearing of them on appeal before the High Court (SIR JOHN STANLEY, C.J. and BURKITT, J.) in I. L. R., 25 All., 618. The suits were for specific performance of the contract, or in the alternative for return of the earnest money paid by the plaintiff. The Subordinate Judge gave the plaintiff decrees for specific performance. On appeal the High Court stated that in view of the conflict of testimony they were not satisfied as to what the contract really was, and could not therefore give a decree for specific performance; but holding that the suits were not barred by limitation as was contended by the defendants, the High Court made a decree in each suit for the recovery of the sum paid by the plaintiff with interest. From that decision the defendants appealed to His Majesty in Council.

In these appeals

Ross for the appellants in appeals 55 and 56, and for the respondents in appeals 57 and 58 contended in appeals 55 and 56 that the courts below were in error in holding that time was not of the essence of the contract. The Subordinate Judge found on the evidence that the period of one month was agreed upon by the parties for the completion of the sale, and if so, it must have been intended to be a binding condition. It was submitted that time *was* of the essence of the contract, and that the plaintiff was entitled on failure of the defendants to complete the sale within the time stipulated to rescind the contract under section 55 of the Contract Act (IX of 1872) and that the decision of the Courts in India to the contrary should be set aside.

With respect to appeals 57 and 58 it was contended for the respondents that the suits out of which they arose had been rightly held barred either by the Civil Procedure Code (Act XIV of 1882) or by the Limitation Act (XV of 1877). As it had been found that the contract was not enforceable and a decree for specific performance could not therefore be granted, it was clear that the plaintiffs, on their alternative plea, were entitled for the reasons given by the High Court to a return of the money paid by them in consideration of the sale. The decision in these appeals should be upheld.

CHOKHEY SINGH AND ANOTHER (DEFENDANTS) v. JOTE SINGH (PLAINTIFF) AND CROSS-APPEAL.

P. C.*
1908.
November 17
December .

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Compromise—Document signed by claimants in mutation proceedings—Acquiescence in partition proceedings.—Act No. XVII of 1876 (Oudh Land Revenue Act), section 74—Suit to dispute title and recover possession of shares to which plaintiff was entitled by Hindu law—Estoppel—Suit in Civil Court on title after partition

THE plaintiff and defendants were claimants to the estate, consisting of 30 villages, of a deceased Hindu, and though by the ordinary Hindu law the plaintiff, as brother of the deceased, was entitled to the whole property as against the defendants, who were nephews (son, of a deceased brother) the three claimants in the mutation proceedings signed in 1896 a document which stated that the property was held, one moiety by the plaintiff and the other moiety by the defendants, and that "there is no other legal heir except the deponents; the mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto." and the revenue authorities effected mutation of names in that way. In 1902 partition which left the parties in the same state as to possession was effected in accordance with the provisions of the Oudh Land Revenue Act (XVII of 1876). In a suit brought in 1904 to recover possession as heir of the deceased of the half share held by the defendants, the latter pleaded (*inter alia*) that their possession was the result of a compromise come to between the parties in the mutation proceedings which was evidenced by the document of 1896, and that the plaintiff was estopped by such mutual arrangement from asserting his present claim.

Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1896 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

In the partition proceedings the plaintiff made no objection to the defendants' title under section 74 of Act XVII of 1876; but he filed an application in which he asked that "the share of Munnu Singh (the deceased) should be decided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 29 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons beside the parties to the present suit and also

* *Present*:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

1908

CHOKHEY SINGH
v.
JOTE SINGH.

because the plaintiff should have raised the question of the defendants' title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition

Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no other parties than the parties to this suit were affected by the partition of the shares in the one village as to which the Courts differed. The Revenue Court had clearly given effect to the plaintiff's application as to the question of *title*, for no inquiry under section 74 of Act XVII of 1876 was made and the question of title was left to be decided by the Civil Court. The grounds of estoppel therefore failed and the plaintiff was entitled to the shares in all the villages sued for.

APPEAL (61 of 1907) and cross-appeal (62 of 1907) consolidated from a judgment and decree (4th May 1906) of the Court of the Judicial Commissioner of Oudh which varied a decree (18th June 1905) of the Subordinate *Judge* of Sitapur who had decreed the plaintiff's claim in full.

The principal question raised on this appeal was the right of succession to the property consisting of 30 villages of one Mannu Singh who died on 24th May 1896. The claimants were his brother Jote Singh, and Chokhey Singh and Gajraj Singh his nephews the sons of a deceased brother. Under the ordinary Hindu law applicable Jote Singh was the nearest heir and entitled to the whole estate, but by an order of the revenue authorities dated 5th November 1896 mutation of names was in fact effected by leaving the property as it was then held, namely an eight anna share in the name of Jote Singh, and the other eight anna share in the names of Chokhey Singh and Gajraj Singh, the former being the elder having a slightly larger share. After mutation of names the parties remained in possession of their respective shares, and later a partition of a portion of the estate was effected in accordance with the provisions of Act XVII of 1876.

The suit out of which the present appeal arose was instituted on 24th November 1904 by Jote Singh against Chokhey Singh and Gajraj Singh to recover possession from them of the eight anna share of Mannu Singh's estate which they had held before and since the mutation proceedings and refused to give up. The plaintiff claimed title as next heir and stated that his consent to the mutation proceedings was given under a misconception of law.

The defence was that on the death of Munnu Singh the defendants, though excluded by the ordinary law, claimed to be entitled to the whole estate under an oral will of Munnu Singh and as being joint in estate with him, and that a compromise was come to between the parties, the result of which was the order in the mutation proceedings. The defendants pleaded a custom in the family that nephews were not excluded by brothers, and contended that the plaintiff was estopped by the mutual arrangement, and by his having acquiesced in the partition from asserting his present claim.

Of the documentary evidence referred to in their report exhibit A 1, which was a joint statement of the claimants in the mutation proceedings, the material portion is set out in their Lordships' judgment. Exhibit A 17, which was a copy of a petition of objections filed by the plaintiff Jote Singh under section 73 of Act XVII of 1876 (the Oudh Land Revenue Act), dated 27th October 1900, in the matter of a claim by a person of the same name (Jote Singh) for partition of Thoke Bhawani in the village Bihat Biram, was to the effect that the plaintiff desired that his interest in the village should be separated from that of the person claiming partition, and stated that he "does not wish to keep his share joint with that of the other defendants." Exhibit No. 58, the purport of which (so far as it is material) is also given in their Lordships' judgment, was an application filed by Jote Singh in reply to the objections taken by the present defendants Chokhey Singh and Gajraj Singh in the matter of the partition of the village Bihat Biram, dated 20th December 1902, and Exhibit A 18 was the order of the Deputy Collector of Sitapur, dated 5th July 1902, regarding the partition of the village of Bihat Biram, and showed that the village was divided into two thokes namely Hathi Singh, and Bhawani Singh, the former of which was allotted to persons none of whom were parties to the present suit; and the latter was partitioned between Chokhey Singh and Gajraj Singh the defendants, who received 8 annas 3⅞ pies of it, and Jote Singh the plaintiff, who obtained 7 annas and 8⅛ pies.

The Subordinate Judge found that there was no ground for the defendants' allegations that they were joint with Munnu Singh, and that he made an oral will in their favour; and held

1908

CHOKHRY SINGH v. JOTE SINGH.

that the dispute on the death of Munnu Singh was not settled by a compromise as alleged by the defendants; that the plaintiff did not consent to mutation in favour of the defendants under any misconception of law; that the succession to the property was not governed by any special custom; and that the plaintiff was not estopped from claiming the property in suit under the provisions of the ordinary Hindu Law. After finding that there was a partition of the property subsequent to the mutation, the Subordinate Judge said:

"It is urged by the learned vakils for the defendants that, inasmuch as there was a partition in accordance with the mutation proceedings, the plaintiff cannot be allowed to bring this suit, the object of which is, as they contend, to disturb or set aside the partition proceedings.

"I do not think that the object of this suit is to disturb or set aside the partition effected by the Revenue Court. The partition remains intact, even after the plaintiff gets a decree in this case. The fact that the decree in this case will either entitle the plaintiff to a fresh partition with regard to the land in defendants' possession or entitle the plaintiff to the land in defendants' possession cannot be said to have an effect of disturbing or setting aside the partition made by the Revenue Courts." I, therefore, find that the fact of partition between the parties does not render the suit unmaintainable. It was further argued by the learned vakils for the defendants that the statement of the plaintiff in the mutation proceedings is a bar to this suit. There is no doubt that the plaintiff through his agent stated before the Tahsildar of Misrikh during the pendency of the mutation proceedings that the defendants were in possession of half the property of Munnu Singh and that the mutation should be effected accordingly. It has not been proved that this statement was the result of any compromise or settlement arrived at between the parties or that it was made to avoid any litigation. Hence, as held by their Lordships of the Privy Council in *Muhammad Imam Ali Khan* v. *Husain Khan* (1) the statement in question can be no bar to this suit.

The decree made by the Subordinate Judge was one in favour of the plaintiff for possession of the property in dispute.

The appeal was heard by two Judges (*Mr. E. Chamier*, Officiating Judicial Commissioner, and *Mr. L. G. Evans*, additional Judicial Commissioner) of the Court of the Judicial Commissioner of Oudh, who agreed with the findings of the Subordinate Judge that the defendants and Munnu Singh did not constitute a joint family, and that there was no will of Munnu Singh in their favour; that no custom of the kind alleged by the defendants was proved; that the allegation of a dispute and a

(1) (1898) I. L. R., 26 Calc., 81; L. R., 25 I. A., 161.

subsequent compromise between the parties, on the death of Munnu Singh in 1896, was not established; and that, rejecting the evidence founded on such allegation, there was nothing in the circumstances of the case with regard to the shares in 29 of the villages in suit which afforded a ground for holding that the plaintiff was estopped from bringing this suit, citing as authority the case of *Muhammad Imam Ali Khan* v. *Husain Khan* (1) with regard, however, to the share in the village of Bihat Biram they considered that the circumstances were somewhat different, and that the plaintiff was estopped from claiming any share in that village. The decision of the Court of the Judicial Commissioner on that point is set out in their Lordships' judgment. The claim of the plaintiff was therefore allowed to shares in all the disputed property except the shares in the village of Bihat Biram.

Both parties appealed from this decision to His Majesty in Council.

On these appeals:

De Gruyther, K. C., and *J. Redwood Davies* for the appellants in appeal No. 61 and for the respondents in the cross-appeal contended that the evidence on the record was sufficient to establish a compromise of the rights of the parties claiming as heirs to the estate of Munnu Singh under which the defendants validly acquired the half share of which they had been ever since in possession. That such an arrangement was made was evidenced by the fact that mutation of names was made on those terms, and by the plaintiff's consent to such mutation having been given. He admitted in his evidence that his consent was not given under any misconception of law as he was at the time aware that he was entitled to the whole of the property. Exhibit A 1 was referred to as showing that the plaintiff agreed to the defendants holding the half share which he was now suing for; that document stated that no one objected to mutation being made in that way. The plaintiff also had acquiesced in that settlement for a long time, and had allowed a partition of the property to be made in accordance with it; and it was submitted that he could not now maintain a suit to set aside that disposition of the property.

(1) (1898) I. L. R., 26 Calc., 81; L. R., 25 I. A., 161.

1908

CHOKHEY SINGH v. JOTE SINGH.

Reference was made to the Oudh Land Revenue Act (XVII of 1876) sections 68, 73, 74 and 75; and the case of *Muhammad Imam Ali Khan* v. *Husain Khan* (1) which had been cited in the judgments of the courts below as authority for the plaintiff's not being estopped by any admission made during the mutation proceedings, was distinguished: and it was submitted that the plaintiff was estopped by his conduct, and by the provisions of the above Act, from claiming not only any share in the village of Bihat Biram, but also any portion of the property in dispute.

Sir R. Finlay, K. C. and *G. E. A. Ross* for the respondent in appeal 61 and for the appellant in the cross-appeal contended in appeal 61 that on the evidence there was no dispute between the parties, which was settled by awarding the property in suit to the defendants; and that had been established by the concurrent findings of both the courts in India. The mutation proceedings conferred no title on the defendants, nor in any way affected the plaintiff's rights, and the Court of the Judicial Commissioner had rightly held that the plaintiff was not estopped by his conduct from maintaining the present suit. That court said:—"All that the defendants did in consequence of the action or inaction of the plaintiff was to take possession of half the property and enjoy the profits thereof. All that is proved in the present case is that the plaintiff gratuitously admitted the right of the defendants to a share." Reference was made to *Muhammad Imam Ali Khan* v. *Husain Khan* (2). In the cross-appeal it was contended that the Court of the Judicial Commissioner was in error in holding that the plaintiff was estopped from claiming the share in the village of Bihat Biram because the special circumstances which had been found by that court to estop the plaintiff from claiming the said share did not amount to an estoppel. Nor was he estopped by the provisions of Act XVII of 1876 (The Oudh Land Revenue Act), to sections 68 and 219, clauses (*d*) and (*e*), of which Act reference was made. Exhibit No. 58 was referred to, to show that in the partition proceedings the plaintiff reserved his right to question in a separate suit the title of the defendants to the share in the village of Bihat Biram. Assuming, therefore, without admitting, that the plaintiff did not raise any objection in

(1) (1898) I. L. R., 26 Calc., 81: L. R., 25 I. A., 161.

(2) (1898) I. L. R. 26 Calc. 81 (99,100): L. R., 25 I. A., 161 (177.)

the partition proceedings with regard to the right of the defendants to possession of the said share, he was not debarred from claiming the share in a suit in the Civil Court.

De Gruyther, K. C., replied.

1903, *December 7th* :—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE :—

The suit out of which these appeals arise relates to the right of succession to the property of one Munnu Singh, who died childless on the 24th May 1896. The property consists of shares in some thirty villages in the District of Sitapur, in the Province of Oudh. The claimants are Jote Singh, the only surviving brother of the deceased, and Chokhey Singh and Gajraj Singh, his nephews, the sons of a brother who had predeceased him.

It is not disputed that, under the ordinary Hindu law applicable to the family, Jote Singh was the nearest heir and entitled to succeed to the whole estate. His nephews, however, sought to defeat his claim on various grounds. They alleged that they had been joint with Munnu Singh during his life-time, and that he had made an oral will in their favour. Both Courts in India found against them on these points. They set up a family custom, whereby brothers and brothers' sons are entitled to succeed together, but they entirely failed to establish such a custom. They further asserted a compromise—and this was the only ground argued before their Lordships—under which they claimed to have acquired a half-share in the estate, by agreement with Jote Singh.

There is no doubt that by an order of the 5th November, 1896, mutation of names in respect of Munnu Singh's property was effected in the following manner; *viz.*, one half into the name of Jote Singh and one half into the names of Chokhey Singh and Gajraj Singh, the former, being the elder, having a slightly larger share. But this mutation of names by itself confers no proprietary title, and it was therefore sought to prove that it was the result of a valid compromise made at the time of the mutation proceedings, and that Jote Singh was thereby estopped from asserting his present claim. Both Courts in India have found as a fact that there was no such compromise,

1908

CHOKHEY SINGH *v.* JOTE SINGH.

and their Lordships see no reason to dissent from the conclusion at which they arrived. It was, however, argued before their Lordships that the Courts below had not given sufficient attention to a document (Exhibit A-1) signed by the three claimants in the mutation proceedings, in which it is stated that—

"Jote Singh, own brother of the deceased, is in possession of half of the *haqqiat* of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the *jethansi* right of Chokhey Singh at the rate of 4 per cent., are in possession of the other half of his share. There is no other legal heir except the deponents. The mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto."

There is no reference in the document to any compromise, and it does not appear to their Lordships that it contains any words that can be construed as amounting to an abandonment by Jote Singh of his legal rights. It is merely a statement of the facts as they existed in regard to the possession of the property—the main point considered by the Revenue authorities upon applications for mutation of names—and, by its silence as to a compromise, tends to support the conclusion that no compromise was ever made.

The Courts in India concurred in holding that, as regards twenty-nine of the villages in which Munnu Singh was a sharer, Jote Singh was entitled to succeed him as his heir according to Hindu law, but as regards one village, Bihat Biram, they differed. That village had been the subject of partition proceedings under the Oudh Land Revenue Act (Act XVII of 1876), and the Judicial Commissioner held that, as a portion of Munnu Singh's share in Bihat Biram was allotted to Chokhey Singh and Gajraj Singh at the partition, Jote Singh was estopped from now claiming it. The Subordinate Judge had held that there was no such estoppel.

The judgment of the learned Judicial Commissioner upon the point is in these terms:—

In 1900, one Jote Singh (not the plaintiff) applied for partition of one of the thokes in the village, whereupon the plaintiff presented a petition (see Exhibit A-17) praying that his entire interest in the village should be separated from that of the applicant Jote Singh as well as from the shares of the present defendants, and this was done with the result that the defendants were allotted a separate patti, which includes the share now in dispute, and their father, Bhikham Singh's, share in the village as one of the sons of Mitan Singh.

The effect of the decree of the Court below is to give the plaintiff a portion of the patti allotted to the defendants at the partition. The defendants, no doubt, conducted their case at the partition on the assumption that they were entitled to half the share of Munnu Singh, junior, and it seems impossible now to put them back into the position which they occupied before the partition, for the partition dealt with the shares of other persons besides those of the parties to the present suit.

Moreover, in the partition the plaintiff had an opportunity, of which he should have availed himself, of objecting to the defendants' title (see section 74 of Act XVII of 1876, the Revenue Act which was then in force). Had he raised the question then, it would have been disposed of before the partition. In my opinion, it is too late now for the plaintiff to claim that portion of Munnu Singh's share in Bihat Biram which was allotted to the defendants at the partition. It appears to me that as to this the plaintiff is estopped.

The learned Judicial Commissioner appears to their Lordships to have been under a misconception on two points of fact. If the order of the Revenue Court in the partition proceedings be looked at, it will be found that it divides the village into two thokes, the first of which, thoke Hathi Singh, is partitioned among five families, none of whom are parties to this suit; while the second thoke, Bhawani Singh, is divided between the parties to this suit, in almost equal proportions. The shares of no other persons are therefore affected by the partition order. In the second place, it appears from Exhibit No. 58, an application filed by Jote Singh in reply to the objections taken by Chokhey Singh and Gajraj Singh in the partition proceedings, and dated 20th December 1902, that Jote Singh asked that "the share of Munnu Singh should be divided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." The Revenue Court appears to have given effect to this application, for no inquiry under section 74 of Act XVII of 1876 was made, and the question of title was left to be decided by the Civil Court in Jote Singh's present suit, which was filed on the 24th November 1904. In the opinion of their Lordships the grounds of estoppel relied on by the learned Judicial Commissioner both fail.

Their Lordships will humbly advise His Majesty that the appeal of Chokhey Singh and Gajraj Singh should be dismissed and the cross appeal of Jote Singh allowed; that the decree of the Judicial Commissioner should be discharged, and the decree

1908

CHOKHEY SINGH v. JOTE SINGH.

of the Subordinate Judge restored except as to costs, Chokhey Singh and Gajraj Singh paying Jote Singh's costs in both Courts.

The appellants Chokhey Singh and Gajraj Singh will pay the costs of Jote Singh in both the appeal and the cross-appeal.

Appeal (No. 61) dismissed.

Cross appeal (No. 62) allowed.

Solicitors for the appellants in appeal No. 61, and for the respondents in appeal No. 62:—*T. L. Wilson & Co.*

Solicitor for the respondent in appeal No. 61, and for the appellant in appeal No. 62:—*Douglas Grant.*

J. V. W.

1908
December 14.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr Justice Griffin.

BHAGWATI (PLAINTIFF) *v.* BANWARI LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 244, 318, 319—Execution of decree—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder auction-purchaser—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 138.

A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree. *Sabhajit v. Sri Gopal* (1) and *Mahabir Pershad Singh v. Macnaghten* (2), referred to.

If after confirmation of a sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure, but also by suit: section 244 of the Code is not a bar to such suit and does not apply to such an application *Raynor v. The Mussoorie Bank, Limited* (3), *Maganlal v. Doshi Mulji* (4) and *Gulzari Lal v. Madho Ram* (5) referred to. *Kalian Singh v. Thakur Das* (6) and *Sheo Narain v. Nur Muhammad* (7) overruled. *Madhusudan Das v. Gobinda Pria Chowdhurani* (8) and *Kattayat Pathumayi v. Raman Menon* (9) dissented from. *Mahomed Mosraf v. Habib Mia* (10) followed *Seru Mohun*

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*Second Appeal No. 288 of 1906, from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 4th of January 1906, affirming a decree of Rama Das, Munsif of Amroha, dated the 24th of September 1904.

(1) (1894) I. L. R., 17 All., 222.
(2) (1889) I. L. R., 16 Calc., 682.
(3) (1885) I. L. R., 7 All., 681.
(4) (1901) I. L. R., 25 Bom., 631.
(5) (1904) I. L. R., 26 All., 447.
(6) Weekly Notes, 1906, p. 67: S. C., 3 A. L. J. R., 234.
(7) (1907) I. L. R., 30 All., 72.
(8) (1899) I. L. R., 27 Calc., 34.
(9) (1902) I. L. R., 26 Mad., 740.
(10) (1904) 6 C. L. J., 749.

Bania v. *Bhagoban Din Pandey* (1), *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2) and *Sandhu Taraganar* v. *Hussain Sahib* (3) referred to. *Prosunno Kumar Sanyal* v *Kali Das Sanyal* (4) distinguished.

No appeal will lie from an order under section 318 of the Code of Civil Procedure. *Narain Singh* v. *Pargash* (5), *Dhunda* v. *Durga* (6), *Ghulam Shabbir* v. *Dwarka Prasad* (7), *Baboo Luchmee Narain* v. *Baboo Bhairow Pershad* (8), *Bhimal Das* v *Ganesha Koer* (9) and *Mahomed Mosraf* v. *Habib Mia* (10) referred to.

An application under section 318 of the Code is not an application for execution or to take a step in aid of execution. The opinion of KNOX, J., in *Kesri Narain* v. *Abul Hasan* (11) and *Moti Lal* v. *Makund Singh* (12) dissented from. So *held* by BANERJI, J., (AIKMAN and GRIFFIN JJ., concurring).

STANLEY, C. J., *contra* (KNOX J., concurring).

Where after sale held in execution of a decree and confirmation of such sale the auction purchaser fails to get possession of the property purchased, proceedings on the part of the purchaser in order to obtain possession are still proceedings relating to the execution, discharge or satisfaction of the decree within the meaning of section 244 of the Code of Civil Procedure. *Moti Lal* v. *Makund Singh* (12), *Muttia* v *Appasami* (13), *Sariatoolla Molla* v. *Raj Kumar Roy* (14), *Kottayat Pathumayi* v. *Raman Menon* (15), *Har Din Singh* v. *Lachman Singh* (16), *Kasinatha Ayyar* v. *Uthumansa Rowthan* (17), *Ram Narain Sahoo* v. *Bandi Pershad* (18), *Sandhu Taraganar* v. *Hussain Sahib* (3), and *Sheo Narain* v. *Nur Muhammad* (19) referred to.

And if the decree-holder has become the auction-purchaser he does not thereby lose his character of decree-holder so as to make any questions thereafter arising between himself and the judgment-debtor other than questions between the parties to the suit in which the decree was passed. *Mahabir Pershad Singh* v. *Macnaghten* (20), *Viraraghava* v. *Venkata* (21) and *Muttia* v. *Appasami* (13) referred to.

THE facts out of which this appeal arose were as follows:

One Musammat Mohini obtained a decree for sale on a mortgage against Shankar Lal. On November 16, 1894, the property was put up to sale and purchased by the decree-holder in the name of Bansidhar. On November 27, 1897, Musammat Mohni obtained the certificate of sale, and on September 20, 1900,

(1) (1883) I. L. R., 9 Calc., 603
(2) (1887) I. L. R., 14 Calc., 644
(3) (1904) I. L. R., 29 Mad., 87
(4) (1892) I. L. R., 19 Calc., 683
(5) Weekly Notes, 1886, p. 45
(6) Weekly Notes 1893, p. 122
(7) (1895) I. L. R., 18 All., 30
(8) N.-W. P., H. C. Rep., 1869, Misc. Ap., 5.
(9) (1897) 1 C. W. N., 653.
(10) (1901) 6 C. L. J., 749.
(11) (1904) I. L. R., 26 All., 365.
(12) (1897) I. L. R., 19 All., 477.
(13) (1890) I. L. R., 13 Mad., 504
(14) (1900) I. L. R., 27 Calc., 709.
(15) (1903) I. L. R., 26 Mad., 740.
(16) (1900) I. L. R., 23 All. 343
(17) (1901) I. L. R. 25 Mad. 529.
(18) (1904) I. L. R., 31 Calc., 737.
(19) (1907) I. L. R., 30 All., 72.
(20) (1889) I. L. R., 16 Calc., 682.
(21) (1882) I. L. R., 5 Mad., 217.

1908

BHAGWATI v. BANWARI LAL.

she made a gift of the property to the plaintiff, Musammat Bhagwati. The judgment-debtors, however, remained in possession of the property, and in 1904, Musammat Bhagwati brought the present suit to recover possession from them. The defence to the suit was, amongst others, that section 244, Code of Civil Procedure, barred the suit. The court of first instance (Munsif of Amroha) sustained this plea and dismissed the suit, and this decree was on appeal affirmed by the Subordinate Judge of Moradabad. The plaintiff thereupon appealed to the High Court.

Upon the appeal coming on for hearing before STANLEY, C. J., and BANERJI, J., on May 16, 1908, it was referred to a Full Bench.

Before the Full Bench:

Munshi *Gokul Prasad*, for the appellant. The question is whether the suit is barred by section 244 (c), Code of Civil Procedure. There is no question of stay here. There are two essential points to consider, (1) whether the question is between *parties to the suit* and (2) whether it is one relating to the *execution, satisfaction or discharge* of the decree. Even though the question may relate to *execution, satisfaction* or *discharge*, section 244 will not apply if the question does not arise between the *parties to the suit*, that is, the judgment debtor or his representatives on the one side, and the decree-holder or his representatives on the other. A question between two judgment-debtors *inter se* or a judgment-debtor and his representative, as is the case here, does not come within the purview of this section. *Raynor* v. *Mussoorie Bank Limited* (1), *Gour Mohun Gouli* v. *Dinonath Karmokar* (2), *Maganlal Mulji* v. *Doshi Mulji* (3), *Ram Saran Pande* v. *Janki Pande* (4) and *Bakhtawar Lal* v. *Baru Mal* (5).

Secondly, the decree was for sale; after the sale had been carried out and confirmed the decree was fully executed, and it mattered nothing to the decree-holder whether the auction-purchaser got possession or not. The auction-purchaser must come in under sections 318 and 319, Code of Civil Procedure, and it is well settled that an order under any one of those sections is

(1) (1885) I. L. R., 7 All., 681, 686. (3) (1901) I. L. R., 25 Bom., 631, 635.
(2) (1897) I. L. R., 25 Calc., 49, 52. (4) (1895) I. L. R., 18 All., 106.
(5) (1907) 4 A. L. J., R., 492, 494.

not appealable. *Narain Singh* v. *Purgash* (1), *Dhunda* v. *Durga*, (2), *Ghulam Shabbir* v *Dwarka Prasad* (3), *Siddo Kunwar* v. *Bansidhar* (4), *Luchmee Narain* v. *Bhairow Pershad* (5), *Bhimal Das* v *Ganesha Koer* (6) and *Mahomed Mosraf* v. *Habib Mia* (7).

Now a decree-holder who has purchased at auction occupies, in the eye of the law, the same position as an independent purchaser does. *Mahabir Pershad Singh* v. *Macnaghten* (8).

The fact that the decree-holder has purchased is a mere accident. *Sabhajit* v. *Sri Gopal* (9).

Article 138, schedule II, Indian Limitation Act, also favours the contention that a suit like the present is maintainable. If the law gives concurrent remedies, a person may elect to adopt the one he prefers. There is no bar to such a suit.

Kalian Singh v. *Thakur Das* (10), proceeds on two grounds, *viz.*, that the auction-purchaser is a representative of the judgment-debtor, and that according to the Privy Council, section 244 must be liberally construed. In this view the case does not affect the present question, as it is contended that the question must arise between the judgment-debtor or his representatives and the decree-holder or his representatives arrayed on opposite sides. In *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (11) it was admitted that the question related to the execution, discharge and satisfaction of the decree, and that it was sought to set aside the sale on the ground of *fraud*.

Delivery of possession is an extraneous incident of the sale. The case of *Madhusudan* v. *Gobinda Pria* (12) is difficult to reconcile with the later cases of the same Court, *e.g.*, in 1 C. W. N., 658. and in 6 C. L. J., 749. *Kasinatha Ayyar* v. *Uthumansa Rowthan* (13), was a case in which the terms of the decree in that particular case were in question and the decision must be taken as confined to the facts therein, as observed in *Quinn* v. *Leathem* (14). *Kattayat* v. *Raman* (15) was decided apparently on the

(1) Weekly Notes, 1886, p. 45.
(2) Weekly Notes, 1893, p. 122
(3) (1885) I. L. R., 8 All., 36.
(4) (1901) I. L. R., 23 All., 476, 477.
(5) (1866) N.-W. P., H. C. Rep., 1866, Misc. Ap., 5
(6) (1897) 1 C. W. N., 658.
(7) (1904) 6 C. L. J., 749
(8) (1889) I. L. R., 16 Calc., 682, 692.
(9) (1894) I. L. R., 17 All., 224, 225.
(10) Weekly Notes, 1906, p. 87.
(11) (1892) I. L. R., 19 Calc., 683.
(12) (1899) I. L. R., 27 Calc., 34, 37.
(13) (1901) I. L. R., 25 Mad., 529.
(14) (1901) A. C., 495, 506, Per Lord Halsbury, L. C.
(15) (1902) I. L. R., 26 Mad., 740.

1908

BHAGWATI v. BANWARI LAL.

principle of *stare decisis*. *Sandhu Taraganar* v. *Hussain Sahib*, (1), *Manickka Odayan* v. *Rajagopal Pillai* (2), *Sheo Narain* v. *Nur Muhammad* (3), and *Bhani Mal* v. *Makkhan Lal* (4) are authorities to the contrary, but it is submitted that the principle of these rulings is opposed to the accepted intrepretation of, and is not warranted by, the language of section 244, which is very clear in itself.

Mr. *B. E. O'Conor*, for the respondents. The tendency of all the courts, since the Privy Council has so held, has been to relegate such questions as have arisen in the present case to section 244 in order to ensure expeditious determination of them. The cases cited from the Madras reports only emphasize that view, and it is certainly in the interests of all parties, inasmuch as determining such questions under section 244 means so much cheapness. It is submitted that the decree-holder by becoming auction-purchaser does not lose his character of decree-holder—one cannot disembody the man. He remains decree-holder all the same. In the case of an independent auction-purchaser the distinction is that he has never been a party to the suit, but the decree-holder has been one all along up to the date of sale. There can be no valid reason why at the time of delivery of possession he should figure as somebody else. The auction-sale cannot be regarded as the point of cleavage.

In the cases of *Madhusudan* v. *Gobinda Pria* (5) and *Kesri Narain* v. *Abul Hasan* (6) application for delivery of possession has been regarded as an application for execution of the decree.

Again *Moti Lal.* v. *Makund Singh* (7) holds that an application by a decree-holder to be put into possession of property he has purchased at auction is a "step in aid of *execution*." It is submitted that these cases go to show that the decree for sale is not complete until in accordance with it the purchaser is also put in possession. It is, therefore, submitted that when a decree-holder seeks to recover possession upon his failure to get it, his remedy is under section 244. The cases in I. L. R. 28 Mad, 87, and in I. L. R.. 30 Mad., 507, favour this contention. Article 138, sch. II, Limitation Act, regulates the period of limitation, and its

(1) (1904) I. L. R., 28 Mad., 87.
(2) (1907) I. L. R., 30 Mad., 507.
(3) (1907) I. L. R., 30 All., 72.
(4) (1908) 5 A. L. J. R., 235.
(5) (1899) I. L. R. 27 Calc., 34, 37.
(6) (1904) I. L. R., 26 All., 365, 367.
(7) (1897) I. L. R., 19 All., 477, 479.

provision cannot control section 244 of the Code of Civil Procedure which regulates the remedies open to the decree-holder and the judgment-debtor.

Gokul Prasad, in reply, referred to the observation of STANLEY, C. J., in *Gulzari Lal* v. *Madho Ram* (1), as to the character of a purchaser at auction.

STANLEY, C.J.—The facts of this case as found by the lower appellate court are as follows:—In execution of a mortgage decree obtained by one Musammat Mohini against one Shankar Lal, the interest of the latter in certain property was sold and purchased in the name of the defendant Bansidhar as a *benamidar* for the decree-holder Musammat Mohini. On the 27th of November 1897 the sale certificate was issued to Musammat Mohini and she by a *tamlihnama*, dated the 20th of September 1900, transferred her interest to her daughter-in-law, the plaintiff Musammat Bhagwati. Bansidhar, the nominal purchaser, purported to resell the property to the defendant Ganga on the 27th of July 1897, and Ganga purported again to sell it to Musammat Mohini, but these last-mentioned sales may be left out of consideration as it is admitted by both Bansidhar and Ganga that Musammat Mohini was the real purchaser. The representatives of the mortgagor were in possession of the property at the date of the sale and they or their transferees have remained in such possession up to the present time. The suit out of which this appeal has arisen was instituted on the 1st of September 1904, that is, about seven years after the date of the sale, for the recovery of possession of portion of the property, the subject-matter of the sale. Both the lower courts have held that the suit is barred by the provisions of section 244 of the Code of Civil Procedure.

In consequence of the conflict of authority in this Court on the question involved in the case, this appeal has been laid before a Full Bench. Section 244 prescribes that all questions arising between the parties to a suit, or their representatives, relating to the execution, discharge or satisfaction of a decree, shall be determined by the court executing the decree, and not a by separate suit. Two questions must be answered in the affirmative before we can

(1) (1904) I. L. R., 26 All., 447, 453.

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

hold that section 244 applies to this case, namely (1) is a mortgagee, who in a suit for sale upon his mortgage applies to the court for and obtains leave to bid and buys the mortgaged property, amenable to the provisions of section 244, and (2) is the plaintiff a representative of the decree-holder Musammat Mohini within the meaning of the expression 'representatives' as used in the section?

To take the first question, the argument in support of a negative answer to it was that as auction-purchaser the decree-holder Musammat Mohini occupied a different character from that of decree-holder, and that *quâ* purchaser she was not a party to the suit, and therefore no question touching the execution of the decree arose between the parties to the suit or their representatives. It is said that it was a mere accident that the decree-holder became the purchaser and that she must be held to occupy the position of a purchaser who had no connection whatever with the suit. It was further contended that the proceedings in the suit determined so soon as the sale was confirmed and that delivery of possession was outside and beyond the scope of the suit, and therefore it was not open to the plaintiff to apply for possession in the execution department and further that in any case the plaintiff was entitled to maintain a separate suit for possession.

I fail to see how the purchase by a decree-holder mortgagee of the mortgaged property can be properly described as an accident. In no way, as it appears to me, can a purchase of the kind be regarded as a mere accident. In the first place a mortgagee decree-holder is not permitted to bid at a sale held in execution of his own decree save with the leave of the Court. The obtaining of such leave is a deliberate act on his part. Then again the making of the highest bid is a deliberate act, and in no true sense, therefore, can a purchase of the kind made by a mortgagee be regarded as accidental. The observation of LORD WATSON in *Mahabir Pershad Singh* v. *Macnaghten* (1), that "leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser" is relied on as establishing a dual character in a

(1) (1889) I. L. R., 16 Calc., 682.

decree-holder purchaser according to which he may for one purpose lay aside his legal obligations as a party to the suit while he retains his rights and privileges in other respects. I do not think that LORD WATSON intended to lay down any such proposition. What I understand by his language is simply this, that the rule which forbids a mortgagee decree-holder to purchase has no force if permission to bid be given to him by the Court, and that when the grant of permission to bid has been given, such mortgagee is no longer under disability to purchase, but *qua the right to purchase is on the same footing* as strangers to the suit who may be bidders at the sale.

It was suggested during the argument that a mortgagee who purchases at a sale held in execution of his own decree, occupies a dual character, such as that which is held by an executor or trustee and that as purchaser he is not also decree-holder and so cannot be regarded as a party to the suit so as to be bound by the provisions of section 244; that, in other words, a question arising between him and the mortgagor judgment-debtor in regard to delivery of possession is not a question arising between the parties to the suit within the meaning of the section. The argument appears to be, that when a sale to a decree-holder mortgagee has been confirmed the decree-holder entirely drops the character of decree-holder and assumes that of purchaser and that any question touching the delivery of possession of the purchased property is not a question between the decree-holder and the mortgagor in possession but is a question between the purchaser only, independently of the character of decree-holder and the mortgagor. The recognition of such a dual personality in a decree-holder purchaser would be, I think, to introduce a strange and novel legal fiction into our jurisprudence. It has been said, and rightly said, that an executor, who is sued as such only, cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. In order that he may be personally bound he must be sued in his personal as well as in his representative capacity. There is, however, in my opinion no analogy between the two cases. An executor not merely claims title from a deceased person, but he represents the deceased person. If he institute a suit in

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

respect of the estate of the deceased, he does so not presumably for his own benefit but for the benefit of the estate of the deceased. If he be sued as an executor only he is sued as representing the deceased. On the contrary, in the case of a decree-holder he sues on his own behalf and for his own benefit. If he get leave to bid and buys the mortgaged property, he does so on his own account and in his own interest alone. I am unable therefore to see how the character of the decree-holder can be split up into two distinct characters so as to enable him to override the provisions of section 244. By becoming a purchaser he does not cease to be a party to the suit and as such to be bound by any order which may be passed therein. The intention of the Legislature in passing the enactment in question was, as it seems to me, to prevent any question which could be disposed of in execution becoming the cause of fresh litigation —see *Viraraghava* v. *Venkata* (1) and *Muttia* v. *Appasami* (2).

But we have further to see whether the obtaining of possession by a mortgagee decree-holder, who purchases at a sale *in execution of his own decree*, is a proceeding in execution within the meaning of section 244. The mortgagees were at the time of the sale, and are stil, in possession of the mortgaged property. Is a mortgagee decree-holder who buys the mortgaged property bound to apply to the Court for delivery of possession within the period prescribed for such step, that is three years, or is he entitled to remain quiescent for a period less than twelve years by a day and then institute a suit for possession? A sale of property is not complete until the vendor has delivered to the purchaser such possession as he is able to give. One of the liabilities of the seller is to give to the buyer on being so required such possession of the property as its nature admits (section 55 of the Transfer of Property Act, 1882). Delivery of possession was necessary in this case to render the sale ordered by the Court final and complete, and was therefore, I think, a step in aid of execution. It is said that upon the confirmation of the sale there was nothing more to be done by the Court,

(1) (1882) I. L. R., 5 Mad., 217. (2) (1890) I. L. R., 13 Mad., 504.

but I am unable to accede to this proposition. The delivery of possession is undoubtedly to my mind a step in aid of execution. This was so held in the case of *Moti Lal* v. *Makund Singh* (1). In that case EDGE, C.J., and BLAIR, J., in their judgment observed :—" A proceeding in execution cannot be said to be completed (at least so far as the decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree. Consequently it appears to us that an application to be paid out of Court the proceeds of such sale must be considered as the taking of a step in aid of the execution of the decree." And further on :—" The execution of his (the decree-holder's) decree cannot be said to be satisfied until in the one case he has received the purchase money paid into court, and in the other case until he be put into possession of the property of his judgment-debtor which he has purchased and which represents money." This ruling was followed in the case of *Muttia* v. *Appasami*, which I have already cited. In that case a decree-holder purchaser applied under section 318 of the Code of Civil Procedure for delivery of the property purchased by him, which was in the occupancy of the judgment-debtor. The judgment-debtor set up an agreement between him and the applicant in bar of the application. MUTTUSAMI AYYAR, J., in the course of his judgment observed :—" When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of section 244." In *Sariatoolla Molla* v. *Raj Kumar Roy* (2), MACLEAN, C. J., and BANERJI, J., held that an application by a decree-holder to be put into possession of property which he had purchased under execution proceedings is an application in aid of execution within the meaning of sub-section (4) of article 179 of schedule II to the Limitation Act. The ruling of this Court in the case of *Moti Lal* v. *Makund Singh* was approved of. In the case of *Kattayat Pathumayi* v. *Raman Menon* (3), a decree-holder became purchaser of immovable property which was sold in execution of his decree. He applied under section

(1) (1897) I. L. R., 19 All., 477. (2) (1900) I. L. R., 27 Calc., 709.
(3) (1902) I. L. R., 26 Mad., 740.

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

318 of the Code of Civil Procedure for delivery of possession of the property purchased, but his application was rejected as barred by limitation, having been made more than three years after the confirmation of the sale. He then brought a suit to recover possession of the land from the judgment-debtor. It was held, following several other decisions of the Madras and Calcutta High Courts that the proceedings taken by the purchaser to obtain possession of the property purchased related to the execution, discharge or satisfaction of the decree within the meaning of section 244, and the suit was therefore dismissed. I do not think it necessary to cite further authorities for this proposition. It is supported by the rulings in the following cases:—*Har Din Singh* v. *Lachman Singh* (1), *Kasinatha Ayyar* v. *Uthumansa Rowthan* (2), *Ram Narain Sahoo* v. *Bandi Pershad* (3), *Sandhu Taraganar* v. *Hussain Sahib* (4), *Sheo Narain* v. *Nur Muhammad* (5).

According to my view, when a Court has passed a decree for sale in a mortgage suit the proceedings are not at an end when the sale to the decree-holder who has obtained liberty to bid has been confirmed and a certificate of sale granted. In such a case, if the mortgagor is in possession, it is the right of the purchaser to ask for and the duty of the Court to grant an order for delivery of possession to him. Until such possession has been given the decree cannot be said to have been executed or satisfied. In England any party to an action in which a sale has been directed who is in possession of the estate may be ordered by the court to deliver up such possession to the purchaser and the court will enforce such delivery of possession by a writ of possession: Order 51, Rule 1, Rules of the Supreme Court. Section 318 of the Code of Civil Procedure similarly provides that when property sold is in the occupation of the judgment-debtor and a certificate has been granted under section 316, the Court shall on application by the purchaser order delivery to him of the purchased property. Here the decree-holder made the purchase in order to satisfy her debt, and so long as the land remains in the possession of the mortgagors the debt to the extent of the price

(1) (1900) I. L. R., 23 All., 343.
(2) (1901) I. L. R., 25 Mad., 123.
(3) (1904) I. L. R., 31 Calc., 737.
(4) (1904) I. L. R., 28 Mad., 87.
(5) (1907) I. L. R., 30 All., 72.

cannot be said to have been satisfied. The fallacy of the argument advanced on behalf of the appellants lies as it appears to me in the assumption that on the grant of the certificate of sale the decree was "completely executed and satisfied." The decree was not, I think, satisfied so long as possession was withheld by the mortgagors from the decree-holder. I may point out that when a decree in a mortgage suit is not wholly satisfied by the proceeds of a sale, proceedings in the suit must be continued if the decree is to be wholly satisfied.

During the argument a suggestion was thrown out that article 138 of schedule II to the Limitation Act supported the appellant's contention. This article allows a period of 12 years to a purchaser of land in execution of a decree within which to bring a suit for possession of the purchased property when, as here, the judgment-debtor was in possession at the date of the sale. This article, it was suggested, was inconsistent with the view expressed in the case of *Sheo Narain* v. *Nur Muhammad.* It seems to me that it in no way supports the appellant's contention. A general provision of the kind cannot override the special provisions of section 244. The article in question may be applicable to the case of a purchaser who was a stranger to the suit in which a decree for sale is passed, and who, not being a party to the suit, is not entitled to take proceedings under section 244, but it can in no way, I think, be regarded as controlling the operation of section 244. The conclusion at which I have arrived therefore is that if a mortgagee decree-holder obtain leave to bid at a sale held in execution of his own decree and becomes the purchaser, he must obtain possession from the mortgagor in possession in the execution department and not by an independent suit.

My brother BANERJI rightly observed in the case of *Gulzari Lal* v. *Madho Ram* (1) that "the trend of recent decisions, both of the Privy Council and of the Courts in this country is in favour of placing on section 244 as wide an interpretation as is compatible with its provisions, so that questions which may be determined by the court executing a decree should not be made the subject of a separate suit." To hold contrary to the view which I have expressed would be not merely to narrow the

(1) (1904) I. L. R., 26 All., 447, 463.

1908

BHAGWATI v. BANWARI LAL.

Stanley, C.J.

interpretation to be placed on that section but also to overrule a decision of a Division Bench of this Court and of a Division Bench of the Calcutta High Court and several decisions of the Madras High Court, as well as the ruling in *Moti Lal* v. *Makund Singh* and the rulings which follow it. On the principle of *stare decisis*, even if there be any doubt as to the propriety of those decisions, I should hesitate to unsettle the law on the question decided by them.

This brings me to the remaining question in the appeal. The plaintiff in this case is not a decree-holder but a donee from the decree-holder. Is she a representative of the decree-holder within the meaning of section 244? I have little or no doubt that she is. It has been held, and I think rightly, that the assignee of a decree-holder purchaser at an auction sale is a representative within the meaning of that expression in section 244. *Sandhu Taraganar* v. *Hussain Sahib* (1); also *Dwar Buksh Sirkar* v. *Fatik Jali* (2). I see no reason for placing a donee of a decree-holder in a higher position than an assignee for value. The word "representatives" appears to me to include a party who by assignment or gift succeeds to the rights of the decree-holder after decree.

I would therefore answer the second question in the affirmative and would for the reasons which I have given dismiss the appeal.

KNOX, J.—The facts found in the appeal are as follows:—

Musammat Mohini as plaintiff obtained a decree for the sale of certain property. In execution of that decree she brought the property to sale and it was purchased by one Bansidhar on the 16th of November 1894. Bansidhar professed to sell the property under a sale-deed dated the 30th of November 1894, to one Gangadhar. Gangadhar professed to sell it to Musammat Mohini the plaintiff. The real purchaser, however, was Musammat Mohini, the decree-holder, and she, on the 27th of November 1897, applied for and obtained the sale certificate. Musammat Mohini, on the 20th of September 1900, executed a *tamliknama* whereby she transferred this property to Musammat Bhagwati, the present plaintiff.

(1) (1901) I. L. R., 23 Mad., 57. (2) (1898) I. L. R., 26 Calc., 252.

Musammat Bhagwati, on trying to obtain possession of the property conveyed to her, found herself opposed by Banwari Lal, son of Shankar Lal, who was judgment-debtor in the decree obtained by Musammat Mohini, in pursuance of which, as already stated, a portion of the house was brought to sale and purchased by Musammat Mohini. She accordingly instituted an ordinary suit for dispossession of Shankar Lal and other persons, who, she alleged, were in collusion with him in refusing to deliver possession. All the defendants, except certain *pro formâ* defendants, put forward as an answer to the plaintiff's claim, that she was a representative of the decree-holder and that as she did not obtain possession of the property purchased within three years, she was not entitled to file the suit and that section 244 of the Code of Civil Procedure operated as a bar. The court of first instance holding that the suit was barred by section 244, dismissed it. The lower appellate court, also taking the same view, held that the suit was barred.

Section 244 lays down that questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof shall be determined by order of the court executing a decree and not by separate suit.

It has been held by a Full Bench of this Court, *Gulzari Lal* v. *Madho Ram* (1) following a Full Bench judgment of the Calcutta High Court, *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (2), that the term "representative" as used in section 244 of the Code of Civil Procedure does not mean only the legal representative of a judgment-debtor, *i.e.* his heir, executor or administrator, but that it means his representative in interest, and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree. In this case my brother BANERJI held, and I think rightly, that every purchaser of the judgment-debtor's interest, who is bound by the decree, is a representative of the judgment-debtor within the meaning of the section, whether he is a purchaser under a private sale from the judgment-debtor or a purchaser at a

(1) (1904) I. L. R., 26 All., 447. (2) (1896) I. L. R., 24 Calc., 62.

1908

BHAGWATI v. BANWARI LAL.

Knox, J.

compulsory sale, held in execution of a decree obtained against the judgment-debtor. He could see no distinction in principle between the case of a purchaser at a private sale and that of an auction purchaser provided that the decree in execution could be enforced against him.

By a similar process of reasoning it appears to me that a donee from a decree-holder, if he, should the necessity arise, can enforce the decree in the execution sale, should be held to fall within the category of representatives of a decree-holder for the purpose of section 244 of the Code.

The object of that section, it appears to me, was to provide for the speedy determination of any question between the decree-holder and the judgment-debtor, should any still be left at such a late stage of the litigation between them. A decree-holder who has fought out his case, won his decree and carried it possibly into several courts of appeal and who elects to buy the property of his judgment-debtor which he has put up to auction, ought to be in a position to know all that need be known about the property. He had ample means in the suit and under the procedure which regulates execution to find out all that need be known. It is to the interest of all that the litigation should be put to an end. Section 244 places the representative in the same position as the decree-holder, and I see no advantage in prolonging the strife by giving the decree-holder who has become purchaser a second capacity.

The learned Chief Justice has gone very fully into the remaining questions raised in the appeal and I do not see that I can with advantage add any thing to what he has said upon these points beyond saying that I agree with what has been said upon them.

Agreeing with the learned Chief Justice, I would dismiss this appeal.

BANERJI, J.—The question raised in this appeal is whether a suit by an auction-purchaser or his representative against the judgment-debtor or his representative for possession of the property sold is barred by the provisions of section 244 of the Code of Civil Procedure.

The facts are these: One Musammat Mohini obtained, on the 12th of March 1891, a decree for the sale of certain hypothecated property against Shankar Lal, the father of the first defendant. In execution of that decree she caused the property, which consisted of a house and lands, to be sold by auction on the 10th of November 1891 and purchased it herself in the name of one Bansidhar. The proceeds of the sale were sufficient to satisfy the decree in full. Bansidhar sold the property to Gangadhar, the son of Mohini, and Gangadhar sold it to Mohini, who obtained a certificate of sale on the 27th of November 1897. Subsequently, on the 20th of September 1900, she made a gift of the property to her daughter-in-law, the plaintiff. As possession was withheld from the plaintiff she brought the present suit against the legal representatives of the judgment-debtor on the 1st of September 1904. The property claimed being a share of a house and land, other co-sharers in it were made defendants *pro forma*. The main defence to the suit was that it was barred by the provisions of section 244 of the Code of Civil Procedure and that the plaintiff's remedy was an application for possession under section 318 of the Code. This contention prevailed in the court of first instance, which dismissed the suit. The decree of that court having been affirmed by the lower appellate court, the present appeal has been preferred by the plaintiff. It is urged on her behalf that section 244 is no bar to the suit and that she had no remedy under that section.

There cannot be any doubt that the purchaser of immovable property at an execution sale which has been confirmed is entitled to obtain possession of the property. If it is in the occupancy of the judgment-debtor or his tenants, the auction purchaser may apply for delivery of possession under section 318 or section 319, as the case may be. Is a question which arises under either of those sections a question which may be determined under section 244? If it is so, no separate suit will lie. The only clause of that section which can be applicable is clause (c). In order that clause (c) may apply two conditions are essential: first, that the question arises between the parties to the suit in which the decree was passed or

1908

BHAGWATI
v.
BANWARI
LAL.

Banerji, J.

their representatives; and second, that it is a question relating to the execution, discharge, or satisfaction of the decree. As regards the first condition it is manifest that the parties must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of section 244. This has been held so repeatedly that I deem it unnecessary to cite authorities. I may refer, however, to the cases of *Raynor* v. *The Mussoorie Bank Limited* (1); *Maganlal* v. *Doshi Mulji* (2), in which it was held that a dispute between the judgment-debtor and his own representative is not a question which may be determined under section 244; and *Gour Mohun* v. *Dinanath* (3), in which the Calcutta High Court held that the section does not apply when a question arises as to the execution of a decree between two persons each of whom claims to be the representative of the decree-holder.

It was held by a Full Bench of this Court in *Gulzari Lal* v. *Madho Ram* (4) that an auction-purchaser of the interests of the judgment-debtor, who is bound by the decree, is his legal representative within the meaning of section 244. Therefore, when a question arises between the judgment-debtor and the auction-purchaser of his interests it is a question between the judgment-debtor and his representative and is consequently not a question which may be determined under that section. The basis of the decision in *Kalian Singh* v. *Thakur Das* (5), namely, that the auction-purchaser being the representative of the judgment-debtor, section 244 applies cannot in my humble judgment be held to be sound. It is contended that the fact of the decree-holder being the auction-purchaser makes a difference and that when such a purchaser applies for delivery of possession the question is one between the parties to the suit. I am unable to accede to this contention. The decree-holder as such is not entitled to possession, as

(1) (1885) I. L. R., 7 All., 681.
(2) (1901) I. L. R., 25 Bom., 631.
(3) (1896) I. L. R., 25 Calc., 49.
(4) (1904) I. L. R., 26 All., 447.
(5) 3 A. L. J. R., 234; S. C., Weekly Notes, 1906, p. 87.

1908

BHAGWATI v. BANWARI LAL.

Banerji, J.

the decree does not award possession. It is only in his capacity as auction-purchaser that he can apply for and obtain possession. In this respect his position is no better and should be no worse than that of any other purchaser. The fact that the decree-holder has purchased the property is, as observed in the Full Bench case of *Sabhajit* v. *Sri Gopal* (1), a pure accident. Although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities, and it is in the latter capacity only that he can obtain possession. It was held by their Lordships of the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (2) that a mortgagee decree-holder who purchases the mortgaged property at auction with the leave of the court is in the same position as any independent purchaser, and sections 318 and 319 of the Code of Civil Procedure make no distinction between a decree-holder auction-purchaser and any other auction-purchaser. I may also refer to article 138 of the second schedule to the Limitation Act, under which a suit may be brought by an auction-purchaser for recovery of possession within twelve years from the date of the auction sale. In that article no distinction is made between different classes of auction-purchasers. I fail to appreciate the reason for holding that if the decree-holder happens to purchase at an auction sale he has a shorter period of limitation for obtaining possession than any other purchaser. In my judgment all auction-purchasers, whether they are decree-holders or not, and whether they purchased under a mortgage decree or under a simple decree for money, are in the same position as regards recovery of possession of the property purchased by them and that it is only in their capacity as auction-purchasers that they can obtain possession. The question, therefore, which arises under section 318 or 319 of the Code of Civil Procedure is not a question between the parties to the suit or their representatives and cannot be determined under section 244. In the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction-purchaser. Under that transfer she acquired no interest

(1) (1894) I. L. R., 17 All., 222. (2) (1889) I. L. R., 16 Calc., 682.

in the decree itself and in no sense can it be said that she is the holder of the decree or the representative in interest of the decree-holder *quâ* the decree. Even, therefore, if it be assumed that a distinction exists between the case of a decree-holder purchaser and any other purchaser (though in my judgment no such distinction exists) that distinction cannot be held to apply in the present suit.

I am further of opinion that a question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to delivery of possession is not a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of section 244, clause (*c*). Upon the judgment-debtor's property being sold and the amount due under the decree being realized the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction purchaser obtains possession of the property sold is wholly immaterial for the purposes of the decree and does not in any way affect it. If the decree-holder purchases the property but does not obtain possession, that circumstance would not entitle him to take out execution of the decree, which has already been satisfied. So long as the sale subsists he cannot claim a refund of the purchase money or ask for execution of the decree to the extent of the amount of the purchase money. It is only when an auction sale has been set aside under section 310A, 312 or 313, that the purchaser may under section 315 obtain a refund, but he is not entitled to a refund if he fails to obtain possession of the property sold. In this respect also the position of the decree-holder purchaser is not different from that of any other purchaser. It is said that an auction sale is not complete until possession has been delivered to the auction-purchaser. I see no warrant in the Code of Civil Procedure for such a view. Under section 314 a sale becomes absolute as soon as it is confirmed, and under section 316 the property vests in the purchaser from the date of confirmation of sale. The purchaser may, no doubt, obtain delivery of possession by an application under section 318 or 319, but the validity of the sale or the completion of it does not depend on his obtaining possession. I am also unable to hold

that if the decree-holder happens to be the auction-purchaser the property purchased by him may be regarded as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold and it is the amount of this purchase money which the decree-holder obtains as the fruits of the decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money, and he may do so, either in cash or by setting it off against the amount of his decree. In the present case the property was sold for Rs. 400, whereas the amount of the decree was Rs. 87 only. The purchaser had to pay the purchase money in cash and she got the property, not in lieu of the amount of her decree but for a much larger sum. The purchase of the property can, therefore, in no sense be regarded as acquisition of the fruits of the decree, and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and a sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree. Section 88 of the Transfer of Property Act, which lays down what a decree for sale should provide, does not direct that possession should be delivered to the purchaser. So far, therefore, as the purchaser is concerned he does not obtain possession by virtue of the decree and the question of delivery of possession to him is not one relating to the execution, discharge or satisfaction of the decree. That the Legislature intended that a purchaser at auction sale may obtain possession by means of a suit is manifest from article 138 of schedule II of the Limitation Act, to which I have already referred. That article makes no distinction between the case of a decree-holder purchaser and that of any other purchaser. I can find no legitimate reason for holding that if a decree-holder happens to purchase the judgment-debtor's property he should be in a worse position than any other purchaser. I am, therefore, of opinion that a decree-holder auction-purchaser, like any other auction-purchaser, is entitled to claim possession, not only by an application under section 318 or section 319, but also by suit; that he has alternative remedies, one of the remedies being a

1908

BHAGWATI v. BANWARI LAL.

summary application for possession, and that section 244 is not a bar to such a suit and does not apply to such an application.

The course of rulings in this Court has, until recently, been to the effect that there is no appeal from an order under section 318 and that such an order is not one under section 244. In *Narain Singh* v. *Pargash* (1), *Dhunda* v. *Durga* (2), *Ghulam Shabbir* v. *Dwarka Prasad* (3) and *Baboo Luchmee Narain* v. *Baboo Bhairow Pershad* (4) it was held that no appeal lies from an order for delivery of possession to an auction purchaser. The same view was taken by the Calcutta High Court in *Bhimal Das* v. *Ganesha Koer* (5) and *Mahomed Mosraf* v. *Habib Mia* (6). The contrary opinion was expressed in this Court in *Kalian Singh* v. *Thakur Das* (7), to which I have already referred. That was a very unfortunate case. The plaintiff as purchaser at an auction sale held in execution of a mortgage decree applied for delivery of possession under section 318. The court of first instance rejected his application as time-barred. On appeal the District Judge held that the application was not beyond time. From his decision an appeal was preferred to the High Court, being First Appeal from Order No. 50 of 1898. The High Court held on 6th August 1898 that no appeal lay to the District Judge and restored the order of the court of first instance. Thereupon the auction-purchaser brought a suit for possession and obtained a decree in the courts below. The High Court on appeal held that the suit was not maintainable and was barred by the provisions of section 244 of the Code of Civil Procedure. The reason for this decision was, as I have pointed out above, that, according to the decision of the Full Bench in *Gulzari Lal* v. *Madho Ram* (8), the auction-purchaser was the representative of the judgment-debtor within the meaning of section 244 and that the aforesaid section was therefore applicable. The learned Judges, as it appears to me, omitted to give effect to the consideration that the auction-purchaser being the representative of the judgment-debtor the question was one

(1) Weekly Notes, 1886, p. 45.
(2) Weekly Notes, 1893, p. 122.
(3) (1895) I. L. R., 18 All., 36.
(4) N.-W. P., H. C. Rep., 1866, Misc. Ap., 5.
(5) (1897) 1 C. W. N., 653.
(6) (1904) 6 C. L. J., 749.
(7) 3 A. L. J. R., 234; S. C., Weekly Notes, 1906, p. 87.
(8) (1904) I. L. R., 26 All., 447.

between the judgment-debtor and his representative and did not therefore come within the purview of section 244. With great deference, therefore, I am unable to follow this ruling. The same view was held by the same learned Judges in *Sheo Narain* v. *Nur Muhammad* (1) reversing the decision of my brother AIKMAN in that case, reported in I. L. R., 29 All. 466. The case of *Kalian Singh* v. *Thakur Das* was referred to and followed, and reference was also made to two recent decisions of the High Courts at Calcutta and Madras and to the decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2). The case in the Calcutta High Court which was referred to is that of *Madhusudan Das* v. *Gobind Pria Chowdhurani* (3), but that case is irreconcilable with the decision of the same Court in the earlier cases of *Seru Mohun Bania* v. *Bhagoban Din Pandey* (4) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (5) and was not followed in the recent case of *Mahomed Mosraf* v. *Habib Mia* (6). In the case last mentioned the purchaser was the decree-holder and the assignee from him applied for possession under section 318. It was held by BRETT and MOOKERJEE, JJ., that section 244 did not apply and no appeal lay. The case of *Madhusudan Das* v. *Gobind Pria Chowdhurani* (7) was referred to but was not followed. I may observe that the learned Judges who decided the case of *Madhusudan Das* v. *Gobind Pria Chowdhurani* themselves felt some difficulty in holding that the question related to the execution, discharge or satisfaction of the decree and they did not refer to the earlier rulings on the point. In *Kattayat Pathumayi* v. *Raman Menon* (8), the other case referred to, the learned Judges (BENSON and BHASHYAM AYYANGAR, JJ.,) doubted the correctness of the view they were adopting, but felt themselves bound by previous rulings on the point. The same was the case with *Sandhu* v. *Husain* (9). In that case the learned Chief Justice (SIR ARNOLD WHITE) expressed the opinion that the question could not be regarded as one relating to the execution of the decree. These cases, therefore, so far from supporting the contention of the respondents, are against them. As for the decision

(1) (1907) I. L. R., 30 All., 72.
(2) (1892) I. L. R., 19 Calc., 683.
(3) (1899) I. L. R., 27 Calc., 34.
(4) (1893) I. L. R., 9 Calc., 602.
(5) (1887) I. L. R., 14 Calc., 644.
(6) (1904) 6 C. L. J., 749.
(7) (1899) I. L. R., 27 Calc., 34.
(8) (1902) I. L. R., 26 Mad., 740.

1908

BHAGWATI v. BANWARI LAL.

Banerji, J.

of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), that was a case in which the judgment-debtor sued to set aside a sale on the ground of fraud, the defendant being the decree-holder. It was conceded by counsel that the question was one under section 244 and their Lordships held that it was so. They do not lay down any general rule, but only express approbation of the fact that the courts in India have not placed a narrow interpretation on the provisions of section 244. That ruling does not, in my judgment, justify the application of those provisions to cases which do not fall within their scope and purview. The only other cases to which the learned counsel for the respondent has referred are *Kesri Narain* v. *Abul Hasan* (2), in which my brother KNOX expressed the opinion that an application under section 318 is an application for execution and *Moti Lal* v. *Makund Singh* (3), in which an application for delivery of possession was held to be an application to take a step in aid of execution. For the reasons I have already stated I am unable to agree with those decisions.

In my judgment the plaintiff's suit is not barred by the provisions of section 244 of the Code of Civil Procedure. I would, therefore, allow the appeal and setting aside the decree of the lower appellate court, remand the case to that court for trial of the other questions which arise in the case.

AIKMAN, J.—The question for decision by this Full Bench is whether a decree-holder who has purchased property at a sale in execution of a decree for money or the assignee of such a decree-holder can maintain a suit against the judgment-debtor or his representative for possession of the property, or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure.

There is no doubt that a purchaser of property sold in execution of a decree for money, whether he be the decree-holder himself or an outsider, can, after he has got a certificate under section 316 of the Code, apply to the Court under section 318 to be put in possession. If for some reason he fails to get possession in this way within three years from the date or grant of the certificate, there is equally little doubt that a purchaser, other

(1) (1892) I. L. R., 19 Calc., 683. (2) (1904) I. L. R., 26 All., 365.
(3) (1897) I. L. R., 19 All., 477.

than the decree-holder, is allowed a period of twelve years under article 137 or 138 of the Limitation Act within which he may bring a regular suit for possession of the property he has bought. I would remark in the first place that there is nothing in the language of these articles which would render them inapplicable to decree-holders who have purchased. If it had been the intention of the Legislature that these articles should have no application to suits by decree-holders, one would have expected the articles to run :—'Suit by a purchaser, other than a decree-holder.'

I am unable to see any reason why a decree-holder who happens to have offered a larger amount than any other bidder at a sale in execution of his decree should have only three years within which to enforce his right to the possession of the property he has bought, whilst an outside purchaser has twelve.

It must be remembered that it is not in his capacity of decree-holder that a decree-holder purchases property in execution of his decree for money. To use the language of the judgment of five Judges of this Court in the Full Bench case, *Sabhajit* v. *Sri Gopal* (1), it is " a pure accident " that a person who is the holder of the decree is also the auction-purchaser. In the case of both a decree-holder auction-purchaser, and an outside auction-purchaser, the title to the property vests as soon as the sale certificate is issued and not before. The ordinary rule is that a person in whom the title to immovable property has vested can bring a suit for possession thereof at any time within twelve years from the date on which he acquired title. Why should a decree-holder, who happens to have been the highest bidder at a sale, have a shorter period ? An independent purchaser would have twelve years within which to enforce his title to the property, and, to use the language of LORD WATSON in the Privy Council judgment in *Mahabir Pershad Singh* v. *Macnaghten* (2), " leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. "

In the case of *Rajah Enayat Hossain* v. *Sumeer Chand* (3) the plaintiff Sumeer Chand had bought from a decree-holder property which the latter had purchased at a sale in execution

(1) (1894) I. L. R., 17 All., 222. (2) (1889) I. L. R., 16 Calc., 682, at p. 693.
(3) (1869) 12 Moo., I. A., 366.

1908

BHAGWATI
v.
BANWARI
LAL.

Ashman J.

of his own decree. In the judgment in that case their Lordships say that there is no foundation in principle or authority for the distinction which it was attempted to set up between a person standing in the position of a claimant under an execution sale and a claimant under any other conveyance or assignment. True, the distinction which it was attempted to set up in that case was one in favour of the execution purchaser. Such a purchaser is in no better position than one who takes under any other conveyance. But is there any reason why he should be in a worse? So far I have attempted to show that there is no *a priori* reason why a decree-holder who buys at a sale in execution of his own decree should not have the same right as an independent purchaser to bring a suit to obtain possession. But it is said that section 244 of the Code of Civil Procedure bars any suit by a decree-holder auction-purchaser. If it is clear that the section does bar such a suit, then, however difficult it may be to see why it should, this appeal must fail.

I have had the advantage of reading the judgment of my brother BANERJI in this case and I agree so entirely with the reasons he gives for holding that section 244 does not bar such a suit, that I feel it unnecessary to add much.

Great stress has been laid by learned Judges who have taken a different view on an observation of their Lordships [illegible] Privy Council in I. L. R., 19 Calc., 683, where they say [illegible] ir Lordships are glad to find that the Courts in Indi[illegible] placed any narrow construction on the language of [illegible] and that when a question has arisen as to the executio[illegible] or satisfaction of a decree between the parties to the [illegible] the decree was passed, the fact that the purchaser, w[illegible] to the suit, is interested in the result has never been he[illegible] the application of the section."

This observation must be read with reference to the fa[illegible] the case which was before their Lordships, and could never in my opinion have been intended to have the effect of taking away a right of suit, which has never been doubted, at all events in this Court, until recently. It will be seen too, that their Lordships recognise that to bring the question within the purview of section 244 it must, first, be between the parties to the suit or

their representatives, and next, it must relate to the execution, discharge or satisfaction of the decree. I fully agree with the reasoning on which my brother BANERJI bases the conclusion at which he has arrived, namely, that a suit by a decree-holder purchaser, or his assignee fulfils neither of these requirements.

Although the case in I. L. R., 27 Calc., 34, is against the appellant, the learned Judges who decided it admit that 'the matter is not so clear' and there are at least three decisions of that Court which are in favour of the appellant. I refer to the cases in I. L. R., 26 Calc., 529; 1 C. W. N., 658, and 6 C. L. J., 749.

There are decisions of the Madras High Court which are against the appellant. But even in that Court doubt has been thrown on the propriety of these decisions. In I. L. R., 26 Mad., 746, the learned Judges say:—"If the question was not already settled by more decisions than one of this Court and of the Calcutta High Court, we should entertain considerable doubt as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as 'relating to the execution, discharge or satisfaction of the decree' within the meaning of section 244, Civil Procedure Code, when such proceedings could not possibly affect the execution, discharge or satisfaction of the decree.

Again in I. L. R., 28 Mad., 87, SIR ARNOLD WHITE, C. J., observed: "If the matter were *res integra*, I should be disposed to hold that the question is not one relating to the execution, discharge or satisfaction of the decree."

There are cases in this and other Courts in which it has been held that an application by a decree-holder purchaser to be put in possession of the property he has bought is an application to the Court to take a step in aid of execution within the meaning of Article 179 of the Second Schedule of the Limitation Act. The learned counsel for the respondents relied on these cases, which do, to some extent, support the view taken by the lower courts in this case. But I agree with my brother BANERJI in doubting the propriety of the view taken in these cases.

An application by an independent purchaser to be put in possession is certainly not an application to take a step in aid of execution, and I do not see why such an application by a decree-holder who has purchased should be deemed to be a step in aid of

1908

BHAGWATI v. BANWARI LAL.

execution. He has got the fruits of his decree when the title to the property vested in him.

With all deference to the learned Judges who have expressed a different opinion, I agree entirely with the judgment of my brother BANERJI and with the order which he proposes to make in this case.

GRIFFIN, J.—In a decree for sale on a mortgage, there is no provision for delivery of possession to the auction purchaser. The Court executing the decree cannot go beyond its terms unless it is expressly empowered by law to do so. Such a power is conferred on the Court by the provisions of sections 318 and 319 of the Code of Civil Procedure. On the facts found in the present case the decree holder auction-purchaser might have applied to be placed in possession, under the provisions of section 318 and section 319 of the Code of Civil Procedure. If he did not so apply or if his application was unsuccessful, he could, in my opinion, fall back upon his title and sue for possession. That title he derived not from the decree, which, in so far as it was a decree for sale, had expended its force, but from his purchase. Under Article 138 of schedule II to the Indian Limitation Act he could bring his suit within twelve years from the date of the sale. Neither in the Code of Civil Procedure nor in the Indian Limitation Act is there any distinction drawn between a decree-holder auction-purchaser and a stranger auction-purchaser.

I would therefore concur in the order proposed by my brothers BANERJI and AIKMAN.

BY THE COURT.—In view of the decisions of the majori[illegible] the Full Bench the order of the Court is that the appeal be [illegible] and the decree of the lower appellate court be s[illegible] inasmuch as that court decided the case upon a preli[illegible] and the Court has overruled it upon that point, we di[illegible] appeal be remanded to the lower appellate court un[illegible] visions of section 562 of the Code of Civil Proce[illegible] directions that it be reinstated in the file of pending a[illegible] its original number and be disposed of on the merits, re[illegible] ing had to the order of the Court in this case. The costs [illegible] appeal will abide the event.

Appeal decreed.

MISCELLANEOUS CIVIL.

1908
December 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
LACHMAN DAS (PETITIONER) *v.* NABI BAKHSH AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 31, 57, 179, 199—Suit by zamindar for ejectment of tenant and sub-lessee—Appeal—Jurisdiction.

A zamindar sued to eject one of his occupancy tenants and also certain sub-lessees to whom the occupancy tenant had sub-let part of his holding for building purposes. *Held* that this was a suit falling within section 31 (2) of the Agra Tenancy Act, 1901, and an appeal from the decree therein lay to the Commissioner and not to the District Judge.

THIS was a reference by the District Judge of Saharanpur. The facts of the case appear from the following order.

"In this case a conflict of jurisdiction arises, and as it appears doubtful whether the appeal is cognizable in the Civil or Revenue court and how the appeal is to be disposed of having regard to the provisions of the N.-W. P. Tenancy Act which give rise to the conflict of jurisdiction, I submit the record to Honourable High Court under section 195 of the N.-W. P. Tenancy Act read with section 193 of the Act and 617 of the Civil Procedure Code together with the following statement of the reasons for my doubt.

"The suit in this case was brought under section 57, clauses (*b*) and (*d*), and sections 31 and 63 of the Rent Act.

"Plaintiff sued as a zamindar for the ejectment of defendant No. 1, his occupancy tenant, on the ground that defendant No. 1 had sublet his land permanently for building purposes to the remaining six defendants. Defendant No. 1, among other objections, raised the point that the claim was not cognizable by a Revenue Court, but no issue was framed by the Lower Court, and the point was not pressed and no question of jurisdiction was decided.

"On the other hand appellant has also appealed against the amount of compensation, which is a matter which can only be appealed to this court.

"The Honourable High Court is therefore asked for a direction as to which court should entertain this appeal.

*Miscellaneous No. 420 of 1907.

1908

LACHMAN DAS v. NABI BAKHSH.

Pandit *Mohan Lal Nehru*, for the appellant.

Mr. *J. Simeon*, for the opposite party.

STANLEY, C.J., and BANERJI, J.—This case has been referred to us by the learned District Judge of Saharanpur under the provisions of section 195 of the Agra Tenancy Act, the learned Judge having doubts as to whether an appeal preferred to him lay in the Civil Court or in the Revenue Court. The suit out of which the reference arises was brought by a landholder against a tenant and sub-lessees from that tenant. The plaintiff's allegation was that the tenant, who is the first defendant, had no power to grant sub-leases to the other defendants, and that by granting the leases the tenant had not only contravened the provisions of the Tenancy Act but had also done an act detrimental to the land and inconsistent with the purpose for which it was let. The suit was described in the plaint as one under sections 57 and 31 of the Tenancy Act. Section 57 of that Act provides that a tenant may be ejected on any of the grounds mentioned in the different clauses of the section. The ground mentioned in clause (*d*) is that the tenant had sub-let or otherwise transferred his holding in contravention of the provisions of the Act. Under clause (*b*) a tenant may be ejected on the ground of any act or omission detrimental to the land in his holding or inconsistent with the purpose for which it was let. If the suit is only against the tenant on the ground specified in clause (*b*) it seems to us that an appeal would lie to the District Judge from the decree of the court of first instance under section 177 of the Act, it being one of the suits included in schedule *IV*, group *B*. But where the suit is for ejectment of the tenant and his transferee on the ground mentioned in clause (*d*) of section 57, it is a suit under the second sub-section of section 31 of the Act and is one of the suits mentioned in group C of the fourth schedule. An appeal in such a case lies to the Commissioner under section 179. The question is whether the present suit is one of the description mentioned in group B, No. 13, or in group C, No. 18. In our judgment the suit was one under section 31 (2), being a suit in which the land-holder sued for the ejectment of the tenant and his sub-lessees on the ground mentioned in clause (*d* of section 57. The fact of the sub-lessees being made parties to the

suit clearly indicates that the suit is one of the description mentioned above. It is not a suit for the ejectment of the tenant on the ground of the commission of a breach of condition by a sub lessee or on the ground of any act done or omission made by such lessee, as mentioned in section 64 (1) (*a*). Therefore the only section under which the suit in this case could be brought, and was brought, was section 31 (2). An appeal from the decree in the suit lay to the Commissioner.

We find that an appeal was preferred to the Commissioner but he returned the memorandum of appeal on the ground that a question of proprietary title was raised. On this point we are unable to agree with the learned Commissioner, inasmuch as the first defendant, the tenant, never denied his tenancy and never claimed proprietary right in the land within the meaning of section 199 of the Act. What he claimed was that under a custom prevailing in the locality he had a right to transfer his holding. This was not a question of proprietary title and section 199 did not therefore apply. In our judgment the appeal ought to have been heard by the Commissioner, and we accordingly direct that the petition of appeal be returned by the District Judge for presentation in the Court of the Commissioner.

APPELLATE CIVIL.

1908
December 14.

Before Mr. Justice Richards and Mr. Justice Griffin.

GOPAL PRASAD AND ANOTHER (DEFENDANTS) *v.* BADAL SINGH AND OTHERS (PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption.

Held that in the case of a suit for pre-emption based upon a contract embodied in the *wajib-ul-arz* the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit. *Janki Prasad* v. *Ishar Das* (1) and *Ram Gopal* v. *Piari Lal* (2) distinguished.

THREE suits for pre-emption were filed by the plaintiff Badal Singh against the appellants in respect of three sales, dated 4th May 1906, 27th June 1906, and 27th August 1906, respectively.

* First Appeal No 91 of 1908 from an order of H. David, Judge of the Court of Small Causes, Cawnpore, exercising powers of a Subordinate Judge, dated the 29th of May 1908.

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.

1908

GOPAL PRASAD v. BADAL SINGH.

The defence to all the suits was that the *wajib-ul-arz* on which the suits were based was the record of a contract and that the period of settlement for which it was prepared had expired. The Court of first instance (Munsif of Akbarpur) accepted the defence and dismissed all the suits. On appeal the Subordinate Judge held that the period of settlement had not expired at the dates of the sales nor at the date of the institution of the suits, although it had expired before the suits were decreed, and set aside the decrees of the Munsif and remanded the cases for trial on the merits.

The defendants vendees appealed.

Dr. *Tej Bahadur Sapru*, for the appellants, contended that the pre emptor must have a subsisting right at the date of the decree and it was not enough that he had a right at the date of sale or the date of institution of suit. He referred to *Janki Prasad* v. *Ishar Das* (1) and *Ram Gopal* v. *Piari Lal* (2).

The plaintiff must show that the contract embodied in the *wajib-ul-arz* was still subsisting. Here the *wajb-ul-arz* had ceased to be operative.

Pre-emption was a restraint on alienation and should not be extended beyond the period for which there was a contract. The pre-emptor could not claim the sympathy of the Court or any equity in his favour.

Munshi *Govind Prasad*, for the respondent, was not called upon.

RICHARDS and GRIFFIN JJ.—This and the connected appeals arise out of pre emption suits. The plaintiff claims on foot of the *wajib-ul-arz*. It has been found by both the courts below that the *wajib-ul-arz* records a contract and not a custom. The court of first instance dismissed the suits upon the ground that the period of settlement for which the *wajib-ul-arz* was prepared had come to an end. The lower court found that the *wajib-ul-arz* was still in existence at the dates of the sales. In the present appeal it has been urged on behalf of the defendants vendees that inasmuch as the settlement, and therefore the contract, had come to end before the time at which a decree could be given, the plaintiff's right to pre-empt must fail. For

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.

the purpose of these appeals it is assumed that the plaintiff had, at the time of the institution of the suits, a right to pre-empt the property by virtue of the contract which is recorded in the *wajib-ul-arz*, and the only question argued here and which we have to decide is whether or not the mere fact that before the date of the decree the period of settlement had determined, prevents the plaintiff from enforcing the right of pre-emption and getting a decree in his favour. The point would be absolutely clear in the absence of authority. The contract was a contract which entitled the plaintiff to purchase if any co-sharer sold his share so long as the contract lasted. It is admitted for the purposes of these appeals that the contract was in full force and effect at the time of the sales. Dr. *Tej Bahadur* on behalf of the appellants, has cited the cases of *Janki Prasad* v. *Ishar Das* (1), and *Ram Gopal* v. *Piari Lal* (2). In both these cases the plaintiff had a right of pre-emption by virtue of the position of his property in the mahal. Before the sale was made partition proceedings had been commenced for the division of the mahal, and before the time for decree had arrived the plaintiff had ceased to be entitled to pre-emption by reason of the division of the mahal in consequence of the partition proceedings. He had ceased to be a co-sharer and the courts held that a decree ought not to be made in his favour, because the principle underlying the right of pre-emption was the keeping out of the stranger. It will be seen that in the cases cited, the plaintiff's position had quite changed during the pendency of the suit. If he had occupied the position at the time of the sale that he occupied at the time of the decree he would have had no right of pre-emption at all. In the present case the plaintiff's right at the time of the decree was exactly the same right as he had at the time of the institution of the suit. In our judgment, the cases cited do not apply and the decision of the court below was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R., 21 All., 374 (2) (1899) I. L. R., 21 All., 441.

1908
December 16.

Before Mr. Justice Richards and Mr. Justice Griffin
BEHARI BHARTHI (PURCHASER) v. BHAGWAN GIR AND OTHERS (DECREE-HOLDERS).*

Act No. IV of 1882 (Transfer of Property Act), sections 88 and 99—Decree-holder holding a decree for sale on a mortgage and also a simple money decree against the same judgment-debtor—Sale in execution of both decrees not unlawful.

Where a decree holder holds both a decree for sale on a mortgage as well as a simple money decree against the same judgment-debtor it is not unlawful for him to bring to sale the mortgaged property in pursuance of an application that it may be sold for the realization of the amounts of both the decrees.

THIS was an application to set aside a sale held in execution of a decree. The decree-holders held a mortgage-de[cree and] al-o a simple money decree against the same judgm[ent-debtor.] They in execution of their simple money decree a[ttached] property which was subject to the mortgage. The[y ...] prayed that the property may be sold in execution [of the mort]gage-decree, and an order was passed accordingly. [Before the] sale was held, however, they asked the Court to se[ll the property] for the realization of the combined amounts of bo[th decrees,] and the Court granted the prayer. The sale was he[ld ...] of November 1907, and the property was purcha[sed by Behari] Bharthi, the appellant. The judgment-debtor a[pplied to set] aside the sale, and the Subordinate Judge granted the [application.] The auction-purchaser appealed.

Mr. *A. H. C. Hamilton*, for the appellant, con[tended that] a joint sale for the amounts under the simple m[oney and] mortgage decrees did not contravene the provisions [of section] 99 of the Transfer of Property Act. The decree-hol[der had] already instituted a suit under section 67. Moreover t[he objec]tion was not raised at the time of sale and should [not be] entertained now. He referred to *Gajrajmati Teorain* v. [...] *Husain*, (1).

The Hon'ble Pandit *Sundar Lal*, for the respondent. [The] application to set aside the sale was made before confirm[ation,] when purchaser's title was not complete. It could only [be] completed when the sale was confirmed. The sale had ta[ken]

* First Appeal No. 46 of 1908, from an order of Maula Bakhsh, Subordinate Judge of Saharanpur, dated the 24th of March 1908.

(1) (1906) I. L. R., 29 All., 196.

1908

BEHARI BHARTHI v. BHAGWAN GIR

of Civil Procedure, for determination of the remaining objections. The appellant will have his costs of this appeal. Other costs will be dealt with by the court hearing the appeal.

Appeal allowed and cause remanded.

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THE INDIAN LAW REPORTS.

APRIL 1909.

(Pages 115—176.)

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Page.

U.

V

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General Index of Cases reported in this Volume.

GENERAL INDEX OF CASES REPORTED IN THIS VOLUME.

PAGE

ACT [illegible] SECTIONS 28, 231 — *Coun-* [illegible] In order to constitute [illegible] Indian Penal Code, it is not necessary that the counterfeit coin should be made with the primary intention of its being passed as genuine: it is sufficient if the resemblance to genuine coin is so close that it is capable of being passed as such

Emperor *v.* Kadir Bakhsh, I. L. R., 30 All. ... 93

[illegible] trate, upon a report made by the police that information given to them charging a person with a specific crime is *false*, *orders* the person giving such information to be prosecuted under section 211 of the Indian Penal Code, such order is not an order to which section 195 (b) of the Code of Criminal Procedure applies, neither is the order passed without jurisdiction if no previous notice to show cause is given to the accused. The more proper course, however, would be to let the informant bring his witnesses into Court, hear them out, and then, if the case was considered to be a false case, to pass an order that the informant should be tried under section 211 of the Indian Penal Code. *Queen-Empress* v *Ganga Ram*, I. L. R., 8 All., 38, *Emperor* v. *Tula*, I. L. R., 29 All., 587 and *Haibat Khan* v. *King-Emperor*, I. L. R., 33 Calc., 31, distinguished

Emperor *v.* Tabarak Zaman Khan, I. L. R., 30 All. ... 52

——— SECTIONS 302, 304, 325, 328 AND 329—*Administration of dhatura for the purpose of facilitating robbery—Death of person to whom dhatura is so administered—Offence* [illegible] purpo[illegible] two [illegible] the t[illegible] that [illegible] that [illegible] grievous hurt; and in respect of the travellers who did not die the offence committed was that defined by section 328 of the Code. *Queen-Empress* v. *Tulsha*, I. L. R., 20 All., 143, not followed.

Emperor *v.* Bhagwan Din, I. L. R., 30 All. ... 563

[illegible]

TABLE OF CASES REPORTED.



PAGE

PRIVY COUNCIL.

APPELLATE CIVIL.

APPELLATE CRIMINAL.

REVISIONAL CRIMINAL.

TABLE OF CASES CITED.

INDEX.

place in contravention of section 99 of the Transfer of Property Act and was void.

RICHARDS and GRIFFIN, JJ.—It appears that the decree-holders held a mortgage decree as well as a simple money decree against the same judgment-debtors. An application was made for the attachment and sale of the mortgage property in execution of the money decree. The property was attached, but no sale took place. The decree-holders then applied to sell the property in execution of the mortgage decree, which was a decree absolute for sale of the mortgaged property. While these proceedings were pending and before the sale was held, the court was asked to sell the property for the realization of the amounts of both the decrees. The property was then sold and was purchased by the appellant, who was not a party to either of the decrees. An application was then made by the judgment debtors to set aside the sale. The court below was of opinion that the sale was null and void on account of the order for sale to realize the amount of both the decrees. The court below seems to have been of opinion that the provisions of section 99 of the Transfer of Property Act were contravened, and refused to confirm the sale, without deciding the other grounds of objection put forward by the judgment-debtors. Hence the present appeal. It seems to us that the court below did not realize that there had been a decree absolute for the sale of the mortgaged property. Section 99 of the Transfer of Property Act is as follows:—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43." In the present case the decree-holder had instituted a suit under section 67. In our opinion there was nothing irregular in selling the property for the amounts of the two decrees. Mr. *Sundar Lal* who appears for the respondent has been unable to cite any authority for the proposition that such sale is irregular. We allow this appeal, set aside the order of the court below, and remand the case under the provisions of section 562 of the Code

1908

BEHARI BHARTHI v. BHAGWAN GIR.

of Civil Procedure, for determination of the remaining objections. The appellant will have his costs of this appeal. Other costs will be dealt with by the court hearing the appeal.

Appeal allowed and cause remanded.

PRIVY COUNCIL.

* P. C.
1908
October 30, November 6, 10, December 15.

KISHORI LAL, (DEFENDANT) *v.* CHUNNI LAL (PLAINTIFF).
and another appeal consolidated.
[On appeal from the High Court at Allahabad].

Evidence—Proof of adoption—Illiterate pardanashin widow lady—Non-appearance of plaintiff in Court as witness—Absence of any account of expenditure on ceremony—Mode of carrying on business—Inability to give date of adoption—Inconsistent and contradictory evidence—Practice for each litigant to cause his opponent to be cited as a witness.

Where the question on an appeal was whether his claim to be the adopted son of an illiterate pardanashin widow lady had been established by the respondent, who lived in her house and was the manager of her business consisting mostly of "zamindari and money dealings," and on whom the burden of proof rested.

Held by the Judicial Committee (reversing the decision of the High Court) that having regard to the contradiction between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; the absence of all reference to the date of the adoption; and above all the non-production of any account of expenditure at the ceremony, which, if his witnesses spoke the truth, must have been notorious in the neighbourhood where it took place, the respondent had failed to discharge the burden of proof which lay upon him, and had not established his claim.

The practice common in litigation in the United Provinces in India for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client, disapproved of by their Lordships of the Judicial Committee as resulting in the embarrassment of litigation, and as being a practice which judicial tribunals ought to set themselves to render as abortive as it is objectionable.

Two appeals, 46 and 47 of 1907, consolidated from a judgment and decree (12th July 1904) of the High Court of Judicature at

* *Present:*—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

Allahabad, which reversed a judgment and decrees (7th February 1902) of the Court of the Subordinate Judge of Aligarh.

The principal question raised on these appeals was whether the respondent Chunni Lal was validly adopted by a lady named Musammat Lachchho as son to her husband Dwarka Das.

The facts of the case are sufficiently stated in their Lordships' judgment.

Chunni Lal from 1891 until July 1899 used to manage the lady's business which consisted largely of "zamindari and money dealings." On 29th July 1899 Musammat Lachchho executed a deed of endowment of certain property, and two powers of attorney to enable mutation of names to be made of the endowed property. In these documents Chunni Lal also entered his own name as her adopted son. The deed of endowment was registered and in consequence publicity was given to the claim advanced by Chunni Lal. His adoption was immediately challenged by the appellant Kishori Lal, a reversioner to the estate of Dwarka Das expectant on the death of his widow, who on 22nd September 1899 instituted a suit (out of which arose appeal 47 of 1907) against Musammat Lachchho and Chunni Lal, mainly for a declaration that the latter had not been validly adopted.

In defence Chunni Lal filed a written statement in which he alleged a formal adoption in the year 1877 made with the permission of Dwarka Das, and also pleaded a custom validating an adoption by the widow of a Bohra Brahmin even without her husband's authority. On 19th March 1900 a written statement was filed purporting to be the written statement of Musammat Lachchho. She obtained information of this some months later and on 29th December 1900 presented a petition repudiating the written statement already filed and denying that she had anything to do with it. On 2nd January 1901 she filed a written statement in which she denied that she had ever adopted Chunni Lal, that her husband had ever given her authority to adopt, and that the Bohra Brahmins were governed by a custom which validated an adoption without authority from the husband.

On 24th December 1900 the suit out of which arose appeal 46 of 1907 was instituted by Chunni Lal against Musammat Lachchho for a declaration of the validity of his adoption and for

1908

KISHORI LAL v. CHUNNI LAL.

possession of the estate of Dwarka Das; and to that suit Kishori Lal was added as a defendant. Both defendants denied that the adoption had ever been made.

The two cases were heard together.

The Subordinate Judge decided that *Chunni Lal had not been* adopted in fact; that Dwarka Das had not given any authority to adopt; and that the custom set up was not proved. He was of opinion that Chunni Lal and his father Maya Ram, were only karindas (agents) of Musammat Lachchho who had all along held possession of the estate. In accordance with these findings he made decrees granting Kishori Lal the relief claimed by him, and dismissing Chunni Lal's suit with costs.

Chunni Lal appealed from both decrees to the High Court and the appeals were heard by SIR J. STANLEY, C. J., and BURKITT, J., who came to the conclusion that Dwarka Das had given his wife authority to adopt and that she had in pursuance of that authority validly adopted Chunni Lal, and as a result decrees were made reversing the decrees of the Subordinate Judge, dismissing the suit of Kishori Lal, and granting Chunni Lal possession of the property in suit.

In the course of their judgment the High Court made the following remarks which are alluded to by their Lordships of the Judicial Committee:—

"The learned Subordinate Judge comments upon the fact that Chunni Lal himself did not come into the witness box. In this case a most objectionable practice which has become prevalent in these Provinces was adopted by the defendants. It has become a not uncommon practice for a plaintiff or defendant, as the case may be, to summon as his or her witness the opposite party. What the object of so doing is it is difficult to see, unless it be to lead the opposite party to keep out of the witness box until the case for his adversary is opened. Such a practice is obviously objectionable. A party should have the opportunity of presenting his case to the court in whatever way he may consider most favourable. This he cannot well do if he is first subjected to what amounts to a cross-examination at the hands of the pleader of the opposite party. There is also this danger that a witness so summoned may not be called at all, and so his case having already closed he is deprived of the benefit of his evidence unless the court permit his examination at that stage of the case. In the present case Chunni Lal though summoned by the opposite party was not called as a witness. We should always under such circumstances be disposed before determining an appeal to direct the examination of a party who has been so summoned and not called as a witness and whose evidence might be most material. We should have done so in the

present case; but for the fact that we are abundantly satisfied upon the evidence which has been adduced as to the side upon which truth lies. We therefore have not thought fit to put the parties to the delay and expense which would be consequent upon an adjournment of the case."

And after a full examination of the whole of the evidence in the case they concluded their judgment in the following terms:—

"We have then the following facts, as it seems to us, clearly established, namely, that Chunni Lal lived with Musammat Lachchho from the time of the alleged adoption, that his marriage and *janeo* expenses were defrayed at the expense of Musammat Lachchho, that the *dasthaun* ceremony of his son was likewise defrayed at her expense; that as adopted son he was appointed her *sarbarahkar* in 1891, that in some suits and bonds he is described as adopted son, that he has been managing her property since the death of his brother Deokaran, that he took part in the ceremonies connected with the dedication of the temple at Soron and in the *pole* ceremony two years later on, and that in the *tamliknama* by which the temple was endowed there is an express recital of his adoption and of the permission given by Dwarka Das to Musammat Lachchho to adopt. In addition to all these matters we have the evidence of a great number of respectable and well-to-do persons, caste fellows and others, who testify to the fact of the adoption, and amongst others, Kashi Ram, the uncle of Chunni Lal, who is himself a reversionary heir of Dwarka Das, on the same level with Kishori Lal. This evidence appears to us to be overwhelming and decisive. It outweighs any inference which might be drawn from the fact that Chunni Lal was known by some persons at all events as the son of Maya Ram and was not known to have been adopted as a son of Dwarka Das, and from the fact that upon adoption mutation of names was not effected in his favour, but the property left in the ostensible ownership of Musammat Lachchho. The desire to have a son in the case of a Hindu is strong, and it is highly probable that Dwarka Das, who had married a young wife, no doubt in the hope of having a son, when he was disappointed in this hope would have given permission to his wives to adopt. The delay in carrying out the adoption does not appear to us unnatural as the learned Subordinate Judge seems to suppose. Musammat Lachchho, a young woman, might not unnaturally desire to retain control of her husband's property as long as possible and no inference unfavourable to the adoption can be drawn from the fact that she delayed the adoption for so many years. We are inclined to think that the key to this litigation is to be found in the answer already mentioned which Musammat Lachchho gave to a question in cross-examination and that answer is:—"Chunni Lal has acted against my wishes and I can tell him this to his face." Evidently there was a quarrel between them, and Musammat Lachchho, who is illiterate and probably not an over conscientious or truthful woman, judging from her evidence, determined to undo what she had done and repudiate the adoption. Possibly she thought that after the lapse of so many years Chunni Lal would not be able to procure satisfactory evidence of it."

1908

KISHORI LAL v. CHUNNI LAL.

possession of the estate of Dwarka Das; and to that suit Kishori Lal was added as a defendant. Both defendants denied that the adoption had ever been made.

The two cases were heard together.

The Subordinate Judge decided that Chunni Lal had not been adopted in fact; that Dwarka Das had not given any authority to adopt; and that *the custom set up was not proved*. *He was* of opinion that Chunni Lal and his father Maya Ram, were only karindas (agents) of Musammat Lachchho who had all along held possession of the estate. In accordance with these findings he made decrees granting Kishori Lal the relief claimed by him, and dismissing Chunni Lal's suit with costs.

Chunni Lal appealed from both decrees to the High Court and the appeals were heard by SIR J. STANLEY, C. J., and BURKITT, J., who came to the conclusion that Dwarka Das had given his wife authority to adopt and that she had in pursuance of that authority validly adopted Chunni Lal, and as a result decrees were made reversing the decrees of the Subordinate Judge, dismissing the suit of Kishori Lal, and granting Chunni Lal possession of the property in suit.

In the course of their judgment the High Court made the following remarks which are alluded to by their Lordships of the Judicial Committee:—

"The learned Subordinate Judge comments upon the fact that Chunni Lal himself did not come into the witness box. In this case a most objectionable practice which has become prevalent in these Provinces was adopted by the defendants. It has become a not uncommon practice for a plaintiff or defendant, as the case may be, to summon as his or her witness the opposite party. What the object of so doing is it is difficult to see, unless it be to lead the opposite party to keep out of the witness box until the case for his adversary is opened. Such a practice is obviously objectionable. A party should have the opportunity of presenting his case to the court in whatever way he may consider most favourable. This he cannot well do if he is first subjected to what amounts to a cross-examination at the hands of the pleader of the opposite party. There is also this danger that a witness so summoned may not be called at all, and so his case having already closed he is deprived of the benefit of his evidence unless the court permit his examination at that stage of the case. In the present case Chunni Lal though summoned by the opposite party was not called as a witness. We should always under such circumstances be disposed before determining an appeal to direct the examination of a party who has been so summoned and not called as a witness and whose evidence might be most material. We should have done so in the

present case; but for the fact that we are abundantly satisfied upon the evidence which has been adduced as to the side upon which truth lies. We therefore have not thought fit to put the parties to the delay and expense which would be consequent upon an adjournment of the case."

And after a full examination of the whole of the evidence in the case they concluded their judgment in the following terms:—

"We have then the following facts, as it seems to us, clearly established, namely, that Chunni Lal lived with Musammat Lachchho from the time of the alleged adoption, that his marriage and *janeo* expenses were defrayed at the expense of Musammat Lachchho, that the *dasthaun* ceremony of his son was likewise defrayed at her expense; that as adopted son he was appointed her *sarbarahkar* in 1891, that in some suits and bonds he is described as adopted son, that he has been managing her property since the death of his brother Deokaran, that he took part in the ceremonies connected with the dedication of the temple at Soron and in the *pola* ceremony two years later on, and that in the *tamliknama* by which the temple was endowed there is an express recital of his adoption and of the permission given by Dwarka Das to Musammat Lachchho to adopt. In addition to all these matters we have the evidence of a great number of respectable and well-to-do persons, caste-fellows and others, who testify to the fact of the adoption, and amongst others, Kashi Ram, the uncle of Chunni Lal, who is himself a reversionary heir of Dwarka Das, on the same level with Kishori Lal. This evidence appears to us to be overwhelming and decisive. It outweighs any inference which might be drawn from the fact that Chunni Lal was known by some persons at all events as the son of Maya Ram and was not known to have been adopted as a son of Dwarka Das, and from the fact that upon adoption mutation of names was not effected in his favour, but the property left in the ostensible ownership of Musammat Lachchho. The desire to have a son in the case of a Hindu is strong, and it is highly probable that Dwarka Das, who had married a young wife, no doubt in the hope of having a son, when he was disappointed in this hope would have given permission to his wives to adopt. The delay in carrying out the adoption does not appear to us unnatural as the learned Subordinate Judge seems to suppose. Musammat Lachchho, a young woman, might not unnaturally desire to retain control of her husband's property as long as possible and no inference unfavourable to the adoption can be drawn from the fact that she delayed the adoption for so many years. We are inclined to think that the key to this litigation is to be found in the answer already mentioned which Musammat Lachchho gave to a question in cross-examination and that answer is:—"Chunni Lal has acted against my wishes and I can tell him this to his face." Evidently there was a quarrel between them, and Musammat Lachchho, who is illiterate and probably not an over conscientious or truthful woman, judging from her evidence, determined to undo what s had done and repudiate the adoption. Possibly she thought that after lapse of so many years Chunni Lal would not be able to procure satisfac evidence of it."

1908

KISHORI LAL v. CHUNNI LAL.

On these appeals

De Gruyther, K.C. and *B. Dube*, for the appellant contended that on the evidence the adoption of the respondent by Musammat Lachchho was not proved. They pointed out that up to the year 1888 there was no trace to be found in any document of the adoption alleged. Musammat Lachchho had remained in possession of the estate, and was still in possession: her name *had remained recorded* as owner notwithstanding the alleged adoption, and still appeared as owner in the Collector's registers; and the business continued to be carried on in her name and for her benefit. The first mention of an adoption was to be found in a bond dated 16th June 1888 which purported to have been executed in favour of Musammat Lachchho and "of Chunni Lal her adopted son." This was followed on 17th December 1890 by three similar bonds executed in renewal of bonds in favour of Musammat Lachchho alone, being a date subsequent to the year of the alleged adoption. In later years there were a few other transactions of the same nature; and *attention* was called to the fact that as Chunni Lal, his father Maya Ram, and his brother Deokaran were managing the business for Musammat Lachchho they could at any time have obtained the insertion of Chunni Lal's name in certain renewed bonds without either her knowledge or consent; and it was in evidence that that was so in the case of the deed of endowment from the registration of which she first came to know that Chunni Lal claimed to be her adopted son. It was also the case that on every occasion from 1892 to 4th March 1899 when Chunni Lal had to give his parentage in public he invariably described *himself as the son of Maya Ram*, whereas if he had been in fact adopted he would have described himself as the son of Dwarka Das. Chunni Lal himself had not given evidence at all; important documents in his possession had not been produced; and many things that required explanation by him remained unexplained. Had the adoption been on the scale and as numerously attended as alleged it would have been an event well remembered in so small a place as the village where it was said to have taken place, and there would have been accounts of the expenditure, which would have been large, yet no such accounts were produced. Reference was made to the

Registration Manual, North-Western Provinces (1885), Part II, Rule 155 which provided that the Registrar should explain the terms of a document to pardanashin ladies and illiterate persons. But many of the documents had not been explained to Musammat Lachhho; in fact it was doubtful whether she ever saw many of them at all. There was no sufficient evidence that Dwarka Das gave any authority to his widows to adopt; and the custom as to such an adoption as is alleged being valid without her husband's permission was not established. It was also submitted that the High Court had failed to give due weight to the numerous admitted facts in the case, which were either wholly inconsistent with an adoption, or rendered it improbable that an adoption ever was made. Reference was made to *Meer Usdoollah* v. *Beeby Imaman* (1), and it was submitted that the principles there laid down as to dealing with conflicting evidence should be applied to this case.

Ross for the respondent contended for (*inter alia*) the reasons given in the extract from the judgment of the High Court above set out that the adoption was fully proved by the evidence in the case, and particularly by the documents relating to the dedication of the temple at Soron. Reference was made to *Mutsaddi Lal* v. *Kundan Lal* (2), Mayne's Hindu Law, 7th edition, page 176, paragraph 137, *Chandra Kunwar* v. *Chaudhri Narpat Singh* (3) and *Lali* v. *Murlidhar* (4).

De Gruyther, K. C., replied.

1908 DECEMBER 15th:—The judgment of their Lordships was delivered by

LORD ATKINSON:—These are consolidated appeals from two decrees of the High Court of Judicature for the North-Western Provinces, Allahabad, dated the *12th July 1904*, by *which the* decrees of the Subordinate Judge were reversed.

The main question for decision in the suits in which these decrees were pronounced, and the sole question for the decision of their Lordships on these appeals, is one of fact, namely, whether Musammat Lachchho, a *pardanashin* lady who is

(1) (1836) 1 Moo. I. A., 19, at p. 44.

(2) (1906) I. L. R., 28 All., 377; (382) L. R., 33 I. A., 55 (57)

(3) (1906) I. L. R., 29 All., 184; L. R., 34 I. A., 27

(4) (1906) I. L. R., 28 All., 488; (492) L. R., 33 I. A., 97 (101).

circumstances under which, and the manner in which, her business was carried on and her affairs managed, make the three abovementioned facts all the more significant.

Dwarka Das, a resident of the village of Thulai, in the District of Aligarh, died in the year 1854 possessed of considerable movable and immovable property situate in this and some neighbouring villages, leaving his two widows, Musammat Jasoda and Musammat Lachchho, him surviving. He was a childless man. Musammat Jasoda, who was much the elder of the two widows, died in 1863. Musammat Lachchho, who had only been married in the year 1852, is still alive. Dwarka Das had a relative, a first cousin once removed, named Maya Ram, who at one time lived in the village of Punner, not far from Thulai. He was by Dwarka Das appointed agent to help in the management of the latter's affairs. After the death of Dwarka Das, Maya Ram continued to act as agent for the widows, and the survivor of them, Musammat Lachchho, up to the time, of his own death in the year 1891, residing with them for a portion of that time, and always taking his food where he did his work. Maya Ram had three sons, Deokaran, the eldest, Moti Ram, and Chunni Lal (the respondent). Deokaran was associated with his father in the management of the estate, and after his father's death continued to manage it up to the time of his own death in the year 1891, when the management was taken up by Chunni Lal, aided by Radha Kishan, who was appointed to assist in the business about six or seven years afterwards. Radha Kishan was married to the daughter of Deokaran, is the attorney of the respondent, superintends this litigation on the latter's behalf, and must therefore be privy to the suppression of the evidence above referred to.

On the 23rd April 1880 Musammat Lachcho executed a power of attorney in the widest possible terms, appointing Deokaran her attorney, empowering him (amongst other things) to institute and defend suits, receive rents, grant leases, release any debt, obtain in her favour any bond relating to money dealings, and to have the same registered, or to execute any bond on her behalf, or file in or take back any document from any court. The endorsement on this instrument describes her occupation as

proper sums in the separate accounts of each. Without these ledgers it is impossible to ascertain who ultimately bore the burden of any expenditure recorded in the day-books. As far as the books produced are concerned, there is, therefore, no proof whatever that the expenses of Chunni Lal's marriage were really borne by Lachchho. She herself says she advanced the money for the marriage and that it was disbursed. If the ledgers were produced, this matter would most probably have been cleared up. That ledgers existed is established by the admission of the respondent himself. In the year 1894, he instituted a suit in the joint names of himself and Lachchho against one Kunj Lal. On the 14th January 1895, a list of documents was produced with the plaint. It is signed by Radha Kishan as agent for Musammat Lachchho, and contains the following item :—

"Eight account books, *i.e.*, 5 day books and 3 ledgers from Sambat 1920 to Sambat 1950, relating to the plaintiff's business."

No ledgers whatever have been produced in these actions by the respondent, and only two day-books. The only witness who purports to account for their disappearance is Radha Kishan who verified this list. He deposes as follows :—

"The goods and property of the *kothi* (firm) are in Chunni Lal's possession. . . . . . My pay is Rs. 100 a year. I wrote the account books and performed the court business. I saw those account books also which were at the time prior to my entering the service. I did not see the account books of the time of Dwarka Das. I have seen the account books from sambat 1929. I might have seen some account books of the time prior to this also. I saw them in the *kothi*. The *haveli* house is called *kothi*.

His examination was continued on the following day, when he again returned to this subject and deposed:—

"The account books, in reference to one of which I made my statement yesterday, were in existence. They were in that very house in which Chunni Lal lived. Now I hear that they are missing. Perhaps they might be locked up. . . . . . The account books were filed in connection with the case of Kunj Lal. I do not recollect the period for which the account books were filed. They were subsequently taken back from the court and had been kept in the *kothi*."

The only rational conclusion which can be drawn from this testimony is that evidence of a most important character has been deliberately suppressed by the respondent. That fact, coupled with his non-production as a witness, covers his case with suspicion. The account books which have been produced,

1908

KISHORI LAL v. CHUNNI LAL.

however, cover the period of his alleged adoption in the year 1877. It must, if it took place, have attracted the attention of almost every inhabitant of the small village of Thulai, and involved considerable expense. The accounts put in evidence on both sides are most detailed in character. Petty items of expenditure down to a fraction of a rupee are duly recorded under many heads. Having regard to the well-known habits of the people of India, as well as to the mode in which the business of this firm was carried on, it is inconceivable that, if this ceremony of adoption ever in fact took place, an account would not have been kept of expenditure incurred in respect of it. Yet there is only one item (a disputed one) of Rs. 5 in the accounts produced in which the word "adoption" is mentioned. It occurs in the middle of the items relating to the marriage of Chunni Lal in the year 1878, and, in their Lordships' opinion, plainly refers to this latter event. Many witnesses have been examined on both sides. They are of somewhat the same class and character—zamindars, money-lenders, persons accused of serious crime though not convicted, inhabitants of the village of Thulai and the adjacent villages; numbers of them of the same brotherhood, some of the same *gotra* as the respondent, many mere cultivators. They flatly contradict each other on almost every important point. Several of the respondent's witnesses not only prove that Dwarka Das before his end gave permission to his wives to adopt a son and gave directions to build a temple to his memory; but, with a vividness of recollection which is almost supernatural, purport to repeat the very words used by him for that purpose more than half a century before they themselves spoke. Others, again, purport to describe the most minute details of the ceremony of adoption, and to repeat the very words used by Maya Ram when he gave over his son, then 9 or 10 years old, to Lachchho and placed him on her lap, though that event must have occurred close on 25 years before the evidence was given.

In addition, many of the respondent's witnesses depose that, on the occasion of the dedication of the temple built by Lachchho near a place called Soron to the idol Dwarka Dhish, certain religious ceremonies were performed by Chunni Lal, because he was the adopted son of Dwarka Das, while almost as many

witnesses examined on behalf of the appellant—including the priest of the temple, Gopi Nath, who was present both at the ceremony of *pratishtha* (the placing of the idol in the temple for the first time) performed in 1883, and the *khamb* ceremony performed in 1893—proved that both of these ceremonies were performed by Lachchho herself, because Chunni Lal was not the adopted son of Dwarka Das, and that invitations to these ceremonies (two of which were produced) were sent out in the name of Dwarka Das, not in the name of his son, as they would have been had he been adopted. The inhabitants of Thulai examined on the appellant's behalf denied that such a remarkable ceremony as that of the adoption described ever took place in their village, while the members of the brotherhood and others examined on the respective sides proved that Chunni Lal passed and was known amongst his brotherhood and neighbours as the adopted son of Dwarka Das, or the son of Maya Ram, his natural father, and not the adopted son of Dwarka Das, according as they were examined for the respondent or appellant. It is impossible to reconcile these conflicting statements on any theory of the defective memory, or failing powers of observation, of the several witnesses who thus contradict each other. The only safe guide to follow in such a case is that afforded by the action and conduct of the principal parties concerned, and the contents of the documents produced. If Chunni Lal was adopted in the year 1877, as alleged, he became the absolute owner of the considerable property, movable and immovable, of which Dwarka Das died possessed, Musammat Lachchho being only entitled to her maintenance out of it; yet down to the time he began to quarrel with her (save in certain matters to be hereafter specially dealt with) not only did he never exercise the rights of an owner over the property, but he did not even assume the airs of ownership. He came to age, according to the Hindu Law, when he was 16, *i.e.*, about 1883, and according to the Indian Majority Act, 1875 (No. IX of 1875), about 1885. Yet, after he reached the age of manhood, he continued for years to act as paid agent over the estate—which, if he was adopted, was his own—at a salary the same in amount as his father received, namely, 3½ *rozgars*. Musamma

1908

Kishori Lal v. Chunni Lal.

Lachchho has continued down to the present to be the registered owner of all the real property belonging to Dwarka Das in the *khewats* of the several villages in which that property is situated. Only once does Chunni Lal's name appear in any *khewat*, and then he is registered as the cultivator of a certain grove, and is described, not as the adopted son of Dwarka Das, but as the son of his natural father, Maya Ram. The income from these several villages was recovered and received by *Musammat* Lachchho in her own name, through the hands of her several agents, including the respondent.

It is not suggested that there was any agreement or arrangement that she should be permitted to remain registered as owner of these lands and act in all respects in that character. The respondent, in his written statement filed in the first action, says her name was "caused to be entered simply to console her." From a time, however, long prior to the adoption down to a recent date, she carried on this business of a money-lender. It may be fairly presumed that it was lucrative, else she would have abandoned it. Maya Ram, Deokaran, and Chunni Lal were her agents for that purpose. Yet, though several documents connected with this business were given in evidence, in none of them of an earlier date than the 15th July 1888 does the respondent's name appear, or is any mention whatever made of the adoption.

That, however, is not all. In corroboration of those of the appellant's witnesses who stated that Chunni Lal passed and was known among his brotherhood as the son of Maya Ram, his natural father, and not as the adopted son of Dwarka Das, a deposition made by him was put in evidence, from which it appeared that in a public court in December 1892 he deposed on oath that his name was Chunni Lal and his father's name Maya Ram. On the 7th January 1896 he signed a *vakalatnama*, executed in a pending suit, in which he described himself as son of Maya Ram. Again, on the 15th July 1898 he signed a similar document, drawn up and executed in a suit instituted by himself, which contains a similar description. A fourth document, possibly the most significant of all, was also given in evidence, namely, a list of biddings at a public auction held on the 21st

October 1895, at which he purchased some property for Rs. 1,200, in which he is described as "Chunni Lal, son of Maya Ram." It may be that the significance of these descriptions can, as was contended on his behalf, be explained away; but if so, the explanation should be given by the respondent himself upon oath, and he has abstained from giving it. As they stand, unexplained, they are inconsistent with his case, and support on this point the evidence given on behalf of the appellant.

It is, however, contended on the respondent's behalf that the several documents now about to be referred to discharge the burden of proof which rests upon him, and establish the fact of his adoption.

It is necessary to examine them in detail.

The first four are money-bonds executed in favour of Musammat Lachchho and Chunni Lal, who is described as the "adopted son," not of Dwarka Das, but of Lachchho. The consideration for two out of the four is a previous debt due to Lachchho alone. The first in date may be taken as a sample of the others. It is a hypothecation bond, dated the 16th June 1888, executed by Jamna and Lekha, two sons of Man Singh, deceased, for a sum of Rs. 800 due "to Musammat Lachchho, wife of Dwarka Das, and Chunni Lal, adopted son of Musammat Lachchho aforesaid." It is witnessed by Kadher Mal, one of the respondent's witnesses, who, in reference to it, deposed that it was written under Deokaran's supervision; that it was not read out to him; that he thought the bond was made in favour of Lachchho; and that the bond at the time of its registration was not read out by the sub-registrar to the executants, one of whom (Jamna) appears to be illiterate.

The fifth document is a petition dated the 8th June 1891, purporting to have been presented on Lachchho's behalf by her pleader Lokman Das, praying that "her adopted son, Chunni Lal," might be appointed her *sarbarahkar*. It is signed by Deokaran as her mukhtar on her behalf. Like the four preceding documents, it is altogether his work. Lokman Das, her pleader, was examined, and stated that Lachchho never came to him on any occasion, and there is nothing to show that the contents of any one of these documents were ever brought to her knowledge.

1908

KISHORI LAL v. CHUNNI LAL

In the month of February 1893, after the death of Deokaran, a suit was instituted in the name of *Musammat Lachchho* against one Gajadhar Singh to recover the amount of a promissory note, dated the 30th December 1889, executed in her favour by Gajadhar Singh and his father, Chet Ram. The pleaders for her in that case were Lokman Das and Jogindar Nath. The latter states that Chunni Lal gave him instructions and came to him to look after the case, and that Lachchho never came to him. The defendant in his written statement raised, on information and belief, the defence that the plaintiff could not recover, as she had adopted Chunni Lal, and that all the property of Dwarka Das, of which this note was part, vested in him. The statement or reply, if any, filed in answer is not in the record, but from the judgment of the Subordinate Judge of Aligarh it would appear that the defence put forward on Lachchho's behalf, presumably on Chunni Lal's instructions, was that she had adopted Chunni Lal as the son of her late husband, but that, notwithstanding this adoption, she had been and was in possession of the money-lending business inherited by her from her late husband, and the decision was to the effect that it was clear upon the evidence that the plaintiff was herself in possession of the money-lending business, and that, as owner in possession as well as the promisee of the note, she was entitled to sue. A good deal of suspicion attaches to these proceedings. They appear to disclose something like contrivance on Chunni Lal's part to get upon the record an admission of his adoption which would not affect the result of the proceedings. Had the suit failed, Lachchho would possibly have heard of the failure, but she would most probably know nothing of the averments contained in the pleadings. From first to last the efforts of Chunni Lal and his brother Deokaran seem to have been directed to bind Lachchho by descriptions of Chunni Lal as her adopted son, introduced into instruments upon the operation of which that description could have no effect whatever, and which would probably never be known to her.

The only other documents with which it is necessary to deal at length are (1) those connected with a suit which purported to be instituted on the 12th November 1894 in the names of

Musammat Lachchho and Chunni Lal, described as "adopted son of Dwarka Das," against one Kunji Lal and Duli Chand to recover possession of a shop in the market town of Hathras part of the estate of Dwarka Das, in which a compromise was entered into, and (2) those connected with a grant of land made to endow the temple erected by the widow to the memory of her husband, at Soron, because these are the only documents whose contents there is any evidence to show were brought to the knowledge of Musammat Lachchho. In the suit against Kunji Lal and Duli Chand, Lokman Das was again the pleader for the plaintiffs. He is not able to state whether he was instructed by Chunni Lal or some other agent of Lachchho's. The claim contains averments that:—

"In his lifetime Dwarka Das was in proprietary possession and enjoyment of the said shop, and since his death Musammat Lachchho, plaintiff, has been in proprietary possession and enjoyment thereof for about 40 years and Chunni Lal, plaintiff, who is joint with her, has been in possession and enjoyment of it since the time of his adoption."

A compromise was arrived at to the effect that the plaintiffs should obtain a decree for possession, the defendants to obtain proprietary possession of the house on paying a lump sum of Rs. 1,500, with interest, within a certain time, and the costs of this and of a preceding suit instituted by the widow alone for rent not to be recovered.

This compromise was embodied in a memorandum entitled "Chunni Lal and Musammat Lachchho, plaintiffs, *v.* Kunji Lal and Duli Chand, defendants." It is signed by Chunni Lal, Duli Chand and Kunji Lal. It does not contain, in the body of it, any reference whatever to the fact of adoption, and except that the plural "plaintiffs" is once used in it instead of the singular "plaintiff," it might, as far as its language is concerned have been drawn up between Lachchho alone and the defendants. This memorandum was filed in Court, and a decree in the suit was on the 13th May 1895 made upon the basis of it. Before decree, however, one Ahmad Husain, an officer of the Munsif's Court at Hathras, went to the village of Thulai to get the compromise verified by Musammat Lachchho. He says that he read over and explained to her the contents of the memorandum, but on cross-examination he admitted that he did not remember

whether any "mention of the adoption was made." Unless he read out the title and emphasised the plural plaintiffs, there is nothing whatever in the document to suggest to Lachchho that she was not suing in this suit, as she had in the previous suit sued, for rent in her own name and in her own right. In this latter suit she was defeated, not on any non-joinder point, or because she was not owner, but solely for the reason that the agreement to pay rent for the shop had not been satisfactorily proved. Ahmad Husain states he drew and signed an attestation clause on this document—in which it is stated that Musammat Lachchho "heard and understood the contents" of the compromise—and duly attested the same. It purports to bear her mark. And the names of Kanhai Ram and Radha Kishan are signed as witnesses. Kanhai Ram was not examined. Radha Kishan swears that "the written statement" (presumably the compromise) was read over to her, and that she put her mark to it. He says nothing about her having understood it, or about its having been explained to her. On that evidence it is, in their Lordships' opinion, impossible to hold that Musammat Lachchho was fixed with the knowledge that Chunni Lal was joined with her in the suit as the adopted son of Dwarka Das, or that he was so described on the record.

The documents in the case on which the respondent most strongly relies are those connected with the endowment of the temple at Soron. They are three in number: (1) A tamliknama bearing date the 29th July 1899; (2) a special power of attorney dated the 8th August 1899; and (3) a special power of attorney dated the 10th August in the same year. They each purport to be executed by Musammat Lachchho and Chunni Lal who is described in each of them as the adopted son of Dwarka Das, and made a party to them in that character.

The tamliknama contains many long and complicated recitals, and amongst others the following:—

"According to the custom of my caste and the members of my brotherhood and under lawful authority and by the permission of my husband, I adopted to him Chunni Lal during his minority and made him his successor, after performing religious ceremonies and carrying out the injunctions of the Hindu law. He (Chunni Lal) has now attained majority and he lives jointly with me and looks after all the affairs relating to the estate of

Dwarka Das. In accordance with the will of my husband, I, the Musammat, constructed at Soron, at the place where the Hindus perform worship, during the minority of the aforesaid Chunni Lal, a pacca stone building called Kunj at the cost of Rs. 50,000, under the supervision and management of Maya Ram, the natural father of the aforesaid Chunni Lal; and in Sambat 1940, I, after Chunni Lal, one of the executants, had attained majority, installed therein Thakur Dwarka Dhish Maharaj after performing the *pratishtha* ceremony according to the principle of the Hindu law."

The document then proceeds to declare, in its operative part, that the Thakur therein named shall remain in proprietary possession of the landed property therein described, in order to pay thereout his salary, and have the temple at Soron cleaned and kept in repair, &c. By the first power of attorney Radha Kishan is appointed attorney to procure a mutation of names in the registry in respect of this property so dedicated, and the second power of attorney is to somewhat similar effect. Musammat Lachchho in her evidence admits that she had built this temple, desired to endow it, and executed a deed for that purpose in favour of Thakurji, the deity named in it. She, however, positively denies that the deed was ever read over to her. She must have been about 60 years of age at that time, and she says her sight was dim. She admits that the registrar came to her house about the deed. She says that she sat behind the curtain, and he outside it; that he asked her if she had executed a deed in favour of Thakurji, and she replied yes: that he questioned her about the property she had given over to Thakurji, and she told him it was the property of Jahangirpur and Tor. She says that the deed was not read out to her by any of those present when she witnessed it, that she asked them to have it read out to her, and was told it would be read out afterwards. She further says that the registrar did not read it out, but merely told her it was a deed of gift to Thakurji. If this account be true, it is obvious that nothing occurred to call her attention to the statements in the deed concerning Chunni Lal's adoption, and in the face of her evidence it is incumbent on the respondent to establish conclusively that these particulars of the deed were brought to her notice before he can in any way rely upon them as admissions against her. The deed was tendered for registration, and before its registration the sub-registrar in Hathras called upon her ..

1908

KISHORI LAL v. CHUNNI LAL.

order to verify it. In his certificate he states that she "admitted the completion and execution of this document after hearing and understanding the same." He was examined as a witness. His evidence is rather extraordinary. He does not deny that she was inside the curtain and he outside, but he says that he read it over to her word for word; that his clerk also read it over to her; that he asked her if she understood the document word for word; that she replied, "I executed the document and I have understood it"; that she then added, "Chunni Lal is my adopted son"; that he said to her, what was the necessity of making mention of adoption therein, and that she replied, "I have made mention (of it) herein to make the matter more secure so that no dispute may arise in future." He admitted that he had not noted down that Lachchho had told him she had made the adoption. This witness proves rather too much. His clerk, who is alive, was not examined. His business would naturally be to find out if she knew that she was disposing of property by this deed, what was its nature and extent, and what was the purpose of the disposition. If the respondent's case be true, his adoption had been notorious for 22 years. Radha Kishan says that he also read the *vakalatnama* and power of attorney to Lachchho. Girdhari Lal, who was a witness to both this deed and the power of attorney of the 10th August, was not produced. Ram Prasad, whose name appears on the power of attorney of the 8th August, was called; he admitted that he drafted this document and said he read it over to Lachchho. He also states that both Lachchho and Chunni Lal said the latter was her adopted son, and then makes the extraordinary statement that it was suggested that the name of Musammat Lachchho should be expunged. According to this evidence the deed was read over to Lachchho three or four times, on as many separate occasions by as many different persons. Why this repetition? It is evident that Chunni Lal and his attorney, who is charged with the duty of superintending this litigation on his principal's behalf, and is therefore party to the suppression of evidence, arranged this entire business. Their Lordships are not satisfied that the passages of these documents dealing with the adoption of Chunni Lal were brought to the knowledge of Lachchho and their effect explained to her, though

the gift and declaration may have been. It was entirely collateral to the main purpose of the deed thus to record what, according to the respondent, was a notorious fact. Their Lordships cannot concur with the High Court that the fact that these or any other documents of the like kind containing such collateral recitals were registered and acted upon raises any presumption whatever that Lachchho was aware of the existence of the recitals in the instrument acted upon.

Of the many suspicious things about these documents containing references to adoption, or describing the respondent as an adopted son, one of the most suspicious is the absence of all reference to the date of the adoption. For all they disclose, it might have occurred at any time between his birth in 1865 or 1866, and July 1888. As far as appears in this case, the date of that ceremony was first fixed when the plaint in the second suit was filed on the 24th December 1900. The first action (*i.e.*, that in which Kishori Lal was plaintiff) was instituted on the 22nd September 1899, over fifteen months previously. In this latter case, though Chunni Lal pleaded that he was adopted, he did not name any date for the ceremony. Having regard to all these facts—the contradictions between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; and, above and beyond all, the non-production of any account of the expenditure at the ceremony of adoption—their Lordships think that the most rational and just conclusion is this, that the respondent has failed to discharge the burden of proof of the adoption which undoubtedly lay upon him, that is, that his case is not proven.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed, the decrees of the High Court discharged with costs, and the decrees of the Subordinate Judge restored.

1908

Kishori Lal v. Chunni Lal.

The respondent must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant:—*Pyke, Parrott & Co.*

Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

1908. December 1.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

BIBA JAN (PLAINTIFF) v. KALB HUSAIN AND OTHERS (DEFENDANTS)*

Muhammadan Law—Sunnis—Waqf—Provision for celebration of anniversary of birth of Ali Murtaza, expenses of the Muharram and the death anniversaries of members of the family of the wâqif, also for repairs of imambara—Waqf held to be valid.

A Muhammadan lady belonging to the *Sunni* sect purported to make a waqf of all her property and provided that a sum amounting to decidedly the larger portion of the income of the dedicated property should be applied annually towards the following purposes, *viz.*, the celebration of the birth of Ali Murtaza, the expenses of keeping *tazias* in the month of Muharram, the anniversaries of the deaths of members of the wâqif's family and the expenses for repairs of an imambara which the wâqif had built, and declared that the property had been dedicated to God and charitable and religious purposes.

Held that the dedication was not illusory; there was an intention of creating a substantial waqf for pious and charitable purposes, and the objects for which the waqf was created were valid.

THE facts of the case were as follows:—

The plaintiff alleged that one Musammat Najiban was the daughter of plaintiff's father's sister, and was the owner of considerable movable and immovable property; that she died on the 4th of June 1904, when she was about 90 years old; that Kalb Husain, defendant No. 1, was the *mukhtar-i-am* and servant of Musammat Najiban; that Ata-ullah, defendant No. 2, also lived with the said Musammat at Bareilly, being the brother of the defendant No. 1; that Musammat Maddo Jan, plaintiff's own sister, who was defendant No. 3 in the suit, also lived with the said Musammat Najiban, who on account of her old age and having no child or near heir was under the undue influence of all these defendants; that the plaintiff was living in her husbands'

* First Appeal No. 52 of 1907, from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 17th of November 1906.

house in the Budaun district; that on the death of Musammat Najiban the plaintiff and her sister, defendant No. 3, became entitled to all the property left by the said Musammat in equal shares; that when the plaintiff made efforts to take possession of the property and to obtain mutation of names in her favour in the Revenue Court, she found that the name of the defendant No. 1 had been entered in the revenue papers in respect of a five biswa zamindari share in mauza Gurgawan under a deed of sale, dated 18th February 1902; that the names of defendants Nos. 1 and 2 were so entered in respect of another five biswa share in the said mauza under a waqfnama, dated the 2nd of November 1902, and that the names of all these defendants were entered in respect of the remaining property under a deed of gift, dated 26th February 1903; that the plaintiff desired to bring a separate suit in respect of the deeds of sale and gift, the present suit being only for possession and mesne profits in respect of the plaintiff's share in five out of ten biswas of mahals *mushtaqil* and *ihtimali* in the said mauza Gurgawan and a house named imambara in Bareilly, which were in the possession of the defendants Nos. 1 and 2 as mutawallis under the said waqfnama and for a declaration that the waqfnama was altogether invalid in law.

The defendants Nos. 1 and 2 contested the suit on the allegations that the plaintiff was not the daughter of Sana-ullah, Musammat Najiban's maternal uncle, and had no right to bring the suit; that the defendants were the sons of the said Sana-ullah, and one Musammat Mammi Jan, being the daughter of the said Sana-ullah, was a necessary party to the suit; that the deed of endowment was valid according to Muhammadan law, and had been executed by Musammat Najiban of her own free will and without any undue influence of any person and while she was in full possession of her senses and in proper health; and the wâqif had relinquished her own possession of the endowed property and had properly put the mutawallis in possession thereof; that the greater part of the income of the endowed property had been assigned for pious and charitable purposes, and a margin of the profits had been left to meet probable contingencies like those of alluvion, diluvion, costs of litigation and arrears, &c., and that if th endowment be held invalid and the plaintiff be proved to be a

1908

KISHORI LAL v. CHUNNI LAL.

The respondent must pay the costs of the appeals.

Appeals allowed.

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Held that the dedication was not illusory; there was an intention of creating a substantial waqf for pious and charitable purposes, and the objects for which the waqf was created were valid.

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The plaintiff alleged that one Musammat Najiban was the daughter of plaintiff's father's sister, and was the owner of considerable movable and immovable property; that she died on the 4th of June 1901, when she was about 90 years old; that Kalb Husain, defendant No. 1, was the *mukhtar-i-am* and servant of Musammat Najiban; that Ata-ullah, defendant No. 2, also lived with the said Musammat at Bareilly, being the brother of the defendant No. 1; that Musammat Maddo Jan, plaintiff's own sister, who was defendant No. 3 in the suit, also lived with the said Musammat Najiban, who on account of her old age and having no child or near heir was under the undue influence of all these defendants; that the plaintiff was living in her husbands'

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daughter of Sana-ullah, she could only claim one out of seven shares of Musammat Najiban's property and that the mesne profits claimed were excessive.

The Court below found that the plaintiff was one of the two daughters of Sana-ullah; that the defendants Nos. 1 and 2 were not sons of Sana-ullah, although they styled themselves as such, being the sons of one Musammat Dhuman a prostitute, who had never been married to Sana-ullah, although living with him; that Mammi Jan was not a necessary party, being the daughter of the said Musammat Dhuman; that the donor had built the imambara house in which she used to hold *majlises* (religious meetings) during *ashra* (the first ten days) of *muharram*, and being of a charitable and religious turn of mind, used to spend Rs. 1,000 to Rs. 1,200 per annum in these *majlises* and charities, and that the waqfnama had been validly executed by her and was consistent with her religious and charitable ideas; that the deed of endowment was not in favour of the defendants Nos. 1 and 2 except in so far as it made them the Mutawallis, and that the waqf in the present case was a valid waqf under the Muhammadan law. It accordingly dismissed the suit with costs. The plaintiff appealed.

Mr. *Abdul Majid*, for the appellant, submitted that the *Fatawa Alamgiri* was the most authoritative book for Sunni Muhammadans. According to it appropriations for reciting the Quran were void. Observance of *taziadari* ceremonies during the muharram were not in accordance with Sunni tenets. There must be *qurbat* (or nearness) between the appropriation and the object. If a Sunni Muhammadan were to make a waqf for *taziadari* ceremonies, there would be total absence of *qurbat*. He cited Baillie's Digest of Muhammadan Law, pp. 558, 569, 575.

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1908

BIBA JAN v. KALB HUSAIN.

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It might be good to hold prayer meetings on the anniversary of a death, but it was not the general practice to observe ceremonies on the anniversary of a birth. The law was that the bulk of the property must go for charitable purposes. If this was not so, the whole waqf was void. The gist of the evidence was that during muharram illuminations took place and some sweets were distributed. These were not the sort of acts which

were meritorious and for which a valid waqf could be made according to Sunni laws. The *fatehah brasi* referred to in the deed could not mean the celebration of the death anniversaries of persons of the family. This was never countenanced by Sunni law. The establishment of an imambara is not a valid object among Sunni Muhammadans. Any sum appropriated for the purposes of the imambara would not go for any valid object, and except for the Imambara no certain object of appropriation was mentioned in the deed. The waqfnama was certainly invalid so far as this was concerned and it was therefore invalid as a whole. Regarding *fatehas*, illuminations and object of waqfs, counsel submitted the following original texts for consideration of the Court:—

(1) "It is reported by Abdullah, son of Masud, that the Prophet of God, may the mercy and peace of God be upon him, has said,--He who beats the cheeks and tears the garments and laments lamentations of the days of dark, is not among us (*i. e.* among my followers)."

"It is reported by Burdah that Abu Musa became unconscious. Then his wife, Umma Abdullah, came and cried out weeping. When he came to his senses, he said, Do you not know (he mentioned the tradition saying) that the Prophet of God, may the mercy and peace of God be upon him, said 'I am angry with the person who gets his head shaved, weeps loudly, and tears his garments.' These traditions are reported by Bokhari and Muslim."

[The Mishkatul Masabih, chapter relating to lamentation on the dead, sub-chapter I, p. 150.]

(2). "Among the objectionable inventions is the act done in most of the towns, *i. e.* the display of large number of lights by waste of money on certain nights of the year."

[The *Al-ukudu Duirrat-o fi-tankihil-Fatawat Hamidiyat-i*, *p.* 359.]

(3). "The Prophet of God, may the mercy and peace of God be upon him, has forbidden the recital of elegies."

[The book of the traditions reported by Ibn-i-Maja, the chapter relating to dead bodies, p. 115.]

So far as *fateha* was concerned there might be some differ-ence of opinion amon[illegible]e authorities. It might be meritorious to some exten[illegible]so far as *taziadari* was concerned there was no [illegible]ch considered it meritorious according to Su[illegible] ns. The case of *Kaldoola* v. *Nuseeruddeen* [illegible]urposes could be meritorious and what *waqfs*

(1) (1894) I. L. R., 18 Mad., 201.

1930

BIBA JAN v. KALB HUSAIN.

might be valid. As in that case, so in this, the waqf contravened the rule against perpetuities. Unless it could be shown that all the objects of *taziadari* were valid, the waqf wholly failed. The case of *Sayed Mustafa* v. *Amina Begam* (1) was a case relating to waqf made by a Shia Muhammadan. Even there the waqf was declared invalid.

There was a difference between Shia and Sunni lawyers as to the definition of waqf: Amir Ali, Muhammadan Law, 390, 2nd ed. According to the Shias a waqf must be for pious objects. According to Sunnis a waqf must lead to the benefit of mankind. The question of the validity of waqf with reference to *fatehah* ceremonies was discussed in *Phul Chand* v. *Akbar Yar Khan* (2), and this was the only reported case counsel could find on the point. The learned Judge had not found whether in this case there was any purpose of endowment pious, religious, or beneficial to mankind according to Sunni ideas. He ought to have found whether the sect or religion to which the waqif was a party countenanced such observances and whether such observances were customary.

So far as the *muallad sharif*, the celebration of the birth ceremony of the Prophet was concerned, it was incumbent on every pious Musalman. But the basal difference between the Sunnis and Shias lay where we came to the position of the fourth Caliph. On the whole, according to Shias, the endowment must be for pious purposes, which according to the Sunnis must be for charitable objects.

It was also to be seen that the waqf was not certain as to all the objects referred to in it—*Fatma Bibi* v. *The Advocate General of Bombay* (3). If their Lordships were of opinion that any of the purposes of waqf mentioned in the deed was illegal the question would remain whether the bulk of the property had been dedicated for charitable purposes or not, or whether it was a perpetual bequest to the mutawallis in the guise of a waqf. The following cases were referred to:—*Phulchand* v. *Akbar Yar Khan* (4), *Muhammad Ahsanulla* v. *Amarchand* (5) and *Abul Fahta* v. *Rasamaya* (6).

(1) (1904) 2 A. L. J. R., 519.
(2) (1896) I. L. R., 19 All. 211.
(3) (1881) I. L. R., 6 Bom., 42.
(4) (1896) I. L. R., 19 All., 211.
(5) (1889) I. L. R., 17 Calc., 498.
(6) (1894) I. L. R., 22 Calc., 619.

A consideration of this question would render it necessary for their Lordships to inquire into the total income and expenditure of the endowed property in order to ascertain whether the appropriation made in the deed was for valid purposes or not. According to the plaintiff out of a total income of Rs. 2,500 after all appropriations and expenses there was a balance of Rs. 1,500 unprovided for in the deed, and this was clearly to go into the pockets of the mutawallis.

Mr. *Abdul Raoof* (Mr. *B. E. O'Conor* with him), for the respondents. The validity of the waqf was attacked on the ground that the objects for which it had been made were not countenanced by Sunni law and that the persons for the benefit of whose souls the endowment had been made were not regarded as sacred by the Sunni Muhammadans. Hazrat Ali was respected by Sunnis as well as Shias. The other three Caliphs his predecessors were revered by the Sunnis only. To say that any ceremony for the commemoration of Hazrat Ali was illegal would be contrary to Sunni tenets. The essence of the muharram ceremonies was that the Musalmans mourned the sad death of the two Imams Hasan and Husain. They were the grandsons of the Prophet and the sons of Hazrat Ali, whom the Shias and Sunnis would alike revere. The real object of *taziadari* (muharram ceremonies) was to assemble to mourn for the sad death of the two Imams. The merits of the ceremonies were not to be judged by any artificial ceremonials that perhaps had gathered round the true object. The people who assembled there would observe a manner of mourning and it could never make the waqf illegal because the idea of the waqf was to commemorate the death of the two Imams. The original authorities cited on behalf of the appellant had no bearing on this point. In reply to that the respondents submitted various authorities in the original. *Fatehas* are offered for the benefit of the souls of the deceased as the Roman Catholics celebrated their mass. The merits from them would also accrue to the good of those who offered them. It was to be observed also that during all these ceremonies substantial gifts were distributed to the poor and to all these who assembled in the *majlises*.

1908

BIBA JAN v. KALB HUSAIN.

It had been argued before their Lordships that portion of the appropriation was bad because the object had not been mentioned with certainty. The words *Fatehah Larsi* etc., could not mean *Fatehahs* for the benefit of all dead souls. A reasonable construction was to be put on such language conveying the wâqif's intentions. The language could only mean that the dead persons of the donor's own family were referred to. Ameer Ali *Muhammadan Law*, Vol. 1, 3rd ed. 174.

There was no uncertainty in the subject-matter, neither in the object The motive was for the good of the poor (*Ibid.* page 323). Even mere vagueness, if there was any, could not invalidate the whole waqf. The law would hold it valid for all the valid purposes enumerated in the deed. Something like the doctrine of *cy-pres* it was submitted, would apply. The case of *Kaleloola* v. *Naseeruddeen* (1) would support the respondents' case better than it would the appellant's. At page 213 it was mentioned that a waqf for *fatehahs* was valid when made for the benefit of the souls of the saints. Again at page 206 the practice, the appellant so strongly objected to, was reported to have been sanctified by long usage and custom. These specific pleas had not been raised in the Court below and so there was no discussion of such matters in the judgment. Had they been so raised there would have been overwhelming evidence to show that the Sunnis as a matter of fact observe such ceremonies.

Upon a proper construction of the deed it would appear that the entire income was to go for charitable purposes. The wâqif herself regarded her entire ten biswas property to be yielding an income of Rs. 2,000 only : for she had leased the whole 10 biswas share for that sum. The *corpus* of the 5 biswa share had been dedicated. The income, whatever it was, (the donor herself regarded it at Rs. 1,000 per annum) was to be regarded as dedicated. No special provisions had been made for the benefit of the mutawalli who were always accountable for the property to the public. It was only when a specific portion of the income was dedicated to charity, side by side with any provisions for the mutawallis that a question could arise whether a sub[illegible] dedication for public charity had been made. Any

(1) (1894) I. L. R., 18 [illegible] 201.

restricting the accountability of the mutawallis were certainly void, but so was not the waqf. Here the question could not arise whether the whole was a scheme in disguise for the benefit of the mutawallis. The donor herself calculated the income of the endowed property to be Rs. 1,000. The position of the Mutawallis in respect of expenditure from this income was more like that of an executor of will. The mere fact that there could be a possible surplus left with the mutawallis would not invalidate the waqf. The whole corpus and so the whole income, together with any possible increase or diminution, was the subject-matter of the waqf. The case of *Muhammad Munawar Ali* v. *Rasulan* (1) related to the waqf of a Sunni. At page 336 the clauses of the waqf are discussed. There a substantial portion of the property had not been dedicated for charitable purposes. Here the entire property had been so dedicated.

The case of *Luchmiput* v. *Amir Alum* (2), would show how far *fatehahs*, &c., were good purposes for waqf. The word *Urs* as defined in Hughes' *Dictionary of Islam*, showed that they were ceremonies for the celebration of any celebrated saint of Islam.

Only a small portion of the income had not been shown as specifically appropriated to any of the specific objects mentioned in the deed. That was because the up-keep of the estate was expensive. Portions of the mahals were subject to heavy litigation owing to alluvion and diluvion. The extra expenses for all these had to be met. The respondents submitted that no portion of the income was meant for their personal benefit. The respondents also relied on *Phul Chand* v. *Akbar Yar Khan* (3), *Sayed Mustafa* v. *Amina* (4). The original authorities submitted will show that the whole waqf could not be set aside simply because an insignificant portion could be said to be unauthorized. The waqf was not bad either on the ground that it was illusory or upon the ground that the objects were not authorized by Muhammadan law.

Mr. *Abdul Majid*, replied.

RICHARDS and GRIFFIN, JJ.—The plaintiff in this suit seeks to set aside a *waqfnama*, dated the 2nd of November, 1902, executed by one Musammat Najiban, and for possession of a half share in property dealt with by the waqfnama, and for mesne profits.

(1) (1899) I. L. R., 21 All., 329.
(2) (1882) I. L. R., 9 Calc., 176.
(3) (1896) I. L. R., 19 All., 211.
(4) (1904) A. L. J. R., 519.

1908

BIBA JAN
v.
KALB HUSAIN.

The plaintiff alleged that the execution of the deed was brought about by the undue influence of Kalb Husain, that Najiban was insane when she executed the deed and that no valid endowment had been created (1) because the objects were not legal, and (2) because the endowment was illusory and really made for the benefit of Kalb Husain and his brother Ataullah, the mutawallis appointed by the waqfnama. This appeal is closely connected with First Appeal No. 341 of 1906 decided on the 27th November 1908, and also with another First Appeal No. 340 of 1906, which it has been unnecessary for us to decide inasmuch as the parties compromised it. The evidence in all these cases was by consent read as evidence in each case. The two connected appeals Nos. 340 and 341 of 1906 arose out of suits to set aside a deed of sale, executed by Musammat Najiban on the 18th of February, 1903, in favour of Kalb Husain on the grounds of the insanity of Musammat Najiban and the undue influence of Kalb Husain. The case of the plaintiff, so far as the plea of insanity was concerned, completely failed, and we have given our reasons at length in First Appeal No. 341 of 1906 for holding that the case founded on undue influence has also failed. The court below decided in favour of the plaintiff in the connected cases on the ground that the transaction came under the provisions of section 16 of the Contract Act. But the present suit was dismissed, the court below being clearly of opinion that Najiban was not insane and that undue influence was not proved. We agree with the court below in this finding and we do not think it necessary to discuss the evidence, particularly as we have already dealt with it in our judgment in First Appeal No. 341 of 1906.

There remains the question of the validity of the waqfnama. In the court below this was certainly not the main ground of attack on the waqfnama, but it was raised by the pleadings and has been argued by Mr. *Abdul Majid* in support of the appeal. Najiban, it is clear from the evidence, was piously and charitably disposed for a number of years before her death. She had built an Imambara at a cost of several thousand rupees. She was in the habit of keeping *tazias* and distributing gifts of food in charity. Her expenses in these acts

of charity amounted to Rs. 1,000 or Rs. 1,200 a year. She took a special interest in these matters. Before her death she made a pilgrimage to Mecca and after her return she continued the same pious course of action. All this clearly appears from the evidence. The endowed property, which of course includes the imambara, is stated in the waqfnama to be worth Rs. 40,000. The landed property exclusive of the imambara is worth Rs. 30,000. It appears that the tenants were some what unruly and there was considerable amount of litigation in realizing the rents. Part of the landed property consisted of a share in an alluvial mahal, the income of which was subject to fluctuation. The waqfnama is to the following effect:—

"Whereas there are a 5 biswa zamindari share in 10 biswa *patti surkh* in the village Gurgawan, pargana Aonla, and a *pacca* newly built house used as Imambara No. $\frac{76}{331}$, in Bareilly near the library, bounded as given below, worth Rs. 40,000, and I am up to this time in proprietary possession thereof without the participation of anyone, I have now in a sound state of body and mind without coercion and of my own accord made a *waqf* of the whole of the said property, i.e. 5 biswas of the village Gurgawan and the house used as imambara together with all the original and appended rights, zamindari appurtenances, *sir* land, groves, collection houses, *abadi*, *bazar* (market), all the *sewai* items and *muafis*, etc., including *mahruka* lands, for religious and charitable purposes subject to the following conditions and have appointed Kalb Husain, general attorney, and Ataullah, sons of Shaikh Sanaullah, as *mutawallis* (superintendents) of the endowed property and put the said *mutawallis* in possession thereof like myself. I shall get mutation of names in respect of the said zamindari share duly effected in the revenue department (Court).

1. The said *mutawallis* should collect rent and every sum of money due in respect of the endowed property, and pay the Government revenue, the village expenses and the salaries of the servants and out of the remaining amount of net profits they should pay under their own management Rs. 200 annually for the expenses of *milad* (birth anniversary) of the last of the Prophets (may the mercy of God be upon him) and that of Ali Murtaza in the months of Rabi-ul-awwal and Ramzan respectively, Rs. 600 for the expenses of making offerings and keeping *tazias* in honour of the chief of the martyrs, namely, Imam Husain and Hasan (may peace be on them) in the month of Muharram, and Rs. 200 for the expenses of the death anniversary of the dead persons and the repairs of the *Imambara*.

2. The said *mutawallis* shall, in no case, have power to sell or mortgage the endowed property, nor shall the said property be liable to pay the debt due by the *mutawallis* or to be sold by auction.

1903

BIBA JAN v. KALB HUSAIN.

pious and religious ceremony not restricted solely to the Shia sect. It may be that the mode of observing the ceremony differs in the case of each sect, but we are satisfied that in the present case the intention of the donor was to continue and perpetuate the religious ceremonies and charitable works in which she had been engaged during her life. The remaining Rs. 200 is appropriated to the death anniversaries (*barsi ammat*) and to the repairs of the Imambara. The latter is admittedly a legitimate object of waqf. The contention of the respondents is that the death anniversaries (*barsi ammat*) should be understood as meaning the death anniversaries of the members of Najiban's family, and we think that this is a reasonable interpretation to be put on the words. We have come to the conclusion, after considering the evidence and the arguments, that the waqfnama was not illusory and there was an intention of creating a substantial waqf for pious and charitable purposes, and we hold that the objects for which the waqf was created were valid. We therefore dismiss this appeal with costs.

Appeal dismissed.

1903
December 14.

APPELLATE CRIMINAL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

EMPEROR v. GUTALI.*

Act No. XLV of 1865 (Indian Penal Code), section 302—Murder—Poisoning by dhatura—Intention—Knowledge.

Dhatura was administered with the usual object of facilitating robbery, but in such quantity that the person to whom it was given died in the course of a few hours.

Held that the person so administering dhatura was rightly convicted under section 302 of the Indian Penal Code.

THE facts of this case are fully stated in the judgment of the Court.

The Assistant Government Advocate, (Mr. *W. K. Porter*) for the Crown.

AIKMAN and KARAMAT HUSAIN, JJ.—The appellant Gutali, *alias* Ajudhia, has been convicted of an offence punishable under section 302 of the Indian Penal Code and sentenced to transportation for life. He has also been convicted of an offence punishable

* Criminal Appeal No. 934 of 1903, from an order of S. R. Daniels, Sessions Judge of Banda, dated the 7th of September 1903.

under section 328 of the Indian Penal Code and sentenced to 10 years' rigorous imprisonment. The sentences have been ordered to run concurrently. We have read through the whole of the evidence and we see no reason whatever to doubt the prisoner's guilt. On the 29th of May last he attached himself to an old man Arjun and his grandson Ram Nath, who had gone to Mahaban to purchase an ox. He was previously unknown to them. He said that he was a Thakur of Chilikpurwa and that he too had come to buy an ox. He remained in their company from 2 or 3 gharis after sunrise until after noon. Both Arjun and his grandson partook of the food which the accused had procured. The accused pressed them to go to the village Karahra where he said he had seen some bullocks for sale. After going a short distance Arjun became ill and fell to the ground unconscious. He and his grandson were seen lying on the road that same evening. The grandson was dead. Arjun and the grandson were seen by the Hospital Assistant, who found in each case the pupils of the eyes dilated. When Arjun was found, he was seen to be plucking at the ground with his hands. The brain of Ram Nath was congested and in the opinion of the Hospital Assistant the congestion was probably caused by poison. Although no poison was found by the Chemical Examiner in the portion of the viscera of Ram Nath sent to him, we think that there can be little doubt that *dhatura* had been administered. When Arjun came to himself, he found that he had been robbed of his money and his grandson's ear-rings had been taken away.

The *dhotis* of both had also been taken away. At that time no trace was found of the person who had been in the company of Arjun and the deceased.

On the 19th of June two more men, Girdhari and Hallia, were joined by an utter stranger, who persuaded them to partake of food which he gave them. They both became unconscious. Before the accused could make off, some residents of Nathupura came up and had their suspicions aroused by what they saw. They arrested the accused as he was attempting to make off. He was taken to the police station and sent to the Hamirpur jail. There on the 1st of July he was picked out by Arjun from amongst a number of under trial prisoners as the man who had

1908

EMPEROR v. GUTALI.

been in his company for several hours on the 20th of May and had given him the food, after eating which he became unconscious and his grandson died. No reason is assigned to account for Arjun or the other witnesses falsely identifying the accused. The evidence of the Hospital Assistant and of the Chemical Examiner clearly proves that Girdhari and Hallia were drugged with *dhatura*. The prisoner called evidence to prove an *alibi* which we agree with the learned Judge in considering quite insufficient to shake the strong case for the prosecution. We see no reason to interfere with either conviction. Although death does not always follow from *dhatura* poisoning, yet it does follow in a considerable proportion of cases. Here the accused must have given *dhatura* to Ram Nath in such a large quantity as to result in his death within 3 or 4 hours. We consider therefore that although he may not have intended to kill Ram Nath, he must be held to have known that his act in giving a dangerous substance in such a quantity was at least likely to cause death. We find no reason for interference and dismiss the appeal. [But see *Emperor* v. *Bhagwan Din*, I. L. R., 30 All., 568 —Ed.]

Appeal dismissed.

1908 *December* 14.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

JHINGAI SINGH v. *RAM PARTAP.**

Criminal Procedure Code, sections 145 and 435—Statute 24 and 25 Vict., Cap. CIV, section 15—Order under section 145, Criminal Procedure Code—Revision—Powers of High Court.

Where proceedings are in intention, in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly empowered to Act under that chapter, the High Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861. *Daulat Koer* v. *Rameswari Koeri* (1), *In re Pandurang Govind* (2) and *Baldeo Baksh Singh* v. *Raj Ballam Singh* (3) referred to. *Maharaj Tewari* v. *Har Charan Rai* (4) followed.

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* Criminal Revision No. 725 of 1908, from an order of D. T. M. Wright, Magistrate 1st Class, of Mirzapur, dated the 24th July 1908.

(1) (1899) I. L. R., 26 Calc., 625.
(2) (1900) I. L. R., 24 Bom., 527.
(3) (1903) 2 A. L. J. R., 274.
(4) (1903) I. L. R., 26 All., 144.

ON the 7th of August 1901, one Mahadeo Singh executed a usufructuary mortgage of certain property belonging to him in favour of Jhingai Singh whereby he mortgaged his interest as *Malik Adna* in the holding. One Makhan Tiwari claimed to be the occupancy tenant of the same holding, and Ram Partab alleged himself to be the sub-tenant of Makhan. In a litigation between Makhan Tiwari and Jhingai Singh before the Subordinate Judge of Mirzapur, a compromise was filed on May 24th, 1905, whereby, subject to certain terms, Makhan Tiwari agreed to surrender possession of the holding to Jhingai Singh. Jhingai Singh obtained possession and executed a *dakhalnama* on the 28th of June 1905, in pursuance of the compromise decree. Subsequent to this Makhan Singh, on the 2nd of July 1905, executed a lease of the holding in favour of Ram Partap. Ram Partap filed a complaint under section 145 of the Code of Criminal Procedure in the court of the Magistrate of Mirzapur against Jhingai Singh. The Magistrate held that Ram Pratap was in actual possession. He did not refer to the proceedings in the Civil Court. Jhingai Singh made an application for revision to the High Court.

Babu *Durga Charan Banerji*, for the applicant, contended that a Magistrate was not justified in disregarding the decree of the Civil Court. It was his duty to uphold and carry out that decree so far as it lay in his power to do so. To take proceedings which necessarily must have the effect of cancelling such decree, was to assume a jurisdiction which the law did not contemplate. The Magistrate having acted without jurisdiction in going behind the judgment of the Civil Court, the High Court had power to interfere. He relied on *Daulat Koer* v. *Rameswari Koeri* (1), *Baldeo Baksh Singh* v. *Raj Ballam Singh* (2) and *In re Pandurang Govind* (3).

Dr. *Tej Bahadur Sapru*, for the opposite party, submitted that where an order under section 145 of the Code of Criminal Procedure existed and the proceedings were in substantial compliance with the requirements of the section, the High Court had no power in revision to interfere. He referred to the proceedings drawn up under section 145, Criminal Procedure Code, and cited

(1) (1899) I. L. R., 26 Calc., 625. (2) (1903) 2 A. L. J., 274.
(3) (1900) I. L. R., 24 Bom., 527.

Baban Singh v. *Baldeo Singh* (1), *Debi Prasad* v. *Sheodat Rai* (2), *Behari Lal* v. *Chajju* (3) and *Maharaj Tewari* v. *Har Charan Rai* (4).

KNOX, J.—This is an application in revision asking this Court to call for the record and to revise an order passed under section 145 of the Code of Criminal Procedure on the ground that the magistrate who passed the order complained of refused to uphold an order passed by the Civil Court and decided the question before him contrary to that order. I have considered the following cases referred to by the learned advocate for the applicant:—*Daulat Koer* v. *Rameswari Koeri* (5), *In re Pandurang Govind* (6) and *Baldeo Baksh Singh* v. *Raj Ballam Singh* (7) decided by this Court on 11th December 1903. But it has already been held by a Bench of the Court in *Maharaj Tewari* v. *Har Charan Rai* (8) that as the law at present stands where the proceedings below are in intention, in form and in fact proceedings under chapter XII of the Code of Criminal Procedure by a magistrate duly empowered to act under that chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861. It has not been shown to me that the proceedings before the learned magistrate were not proceedings under chapter XII of the Code or that he was not duly empowered to act under that chapter. According to the contention of the learned advocate it was after being properly seised of the case that the learned magistrate went out of his way, passed an order which he had no jurisdiction to pass, and that by it the learned advocate's client has been debarred from all remedy and deprived of the fruits of the case won by him in the Civil Court. This may or may not be so. The fact remains that section 435 expressly excepts records of proceedings under chapter XII, and I know of no other Act or Statute which confers upon this Court the power of sending for such proceedings. The application is dismissed.

Application dismissed.

(1) Weekly Notes, 1907, p. 50.
(2) Weekly Notes, 1907, p. 265.
(3) Weekly Notes, 1907, p. 49.
(4) (1903) I. L. R., 26 All., 144.
(5) (1899) I. L. R., 26 Calc., 625.
(6) (1900) I. L. R., 24 Bom., 527.
(7) (1903) 2 A. L. J. R., 274.
(8) (1903) I. L. R., 26 All., 144.

Before Mr. Justice Richards and Mr. Justice Griffin.

1908
December 16.

KISHAN KUNWAR (PLAINTIFF) v. GANGA PRASAD (DEFENDANT).*

Civil Procedure Code, (1882), section 202—Procedure—Court not competent to alter judgment after delivery.

Where a District Judge wrote and delivered a judgment in a civil appeal, but suspended the issue of his decree pending the production by the plaintiff of a certificate of succession, it was *held* that it was not competent to the Judge to cancel the judgment already delivered and to pronounce a second judgment inconsistent therewith.

THE facts out of which this appeal arose are as follows:—

The defendant No. 1 executed a mortgage in favour of Makhan Lal, husband of the plaintiff, on 18th January 1901. Makhan Lal died leaving plaintiff as sole heir and representative. She brought this suit for sale on foot of the mortgage of the 18th of January 1901. The defendant No. 2 held a prior usufructuary mortgage as well as a subsequent mortgage over the same property. He pleaded that two sisters of the mortgagor were also owners of the mortgaged property and were necessary parties to the suit and that the plaintiff, being a mortgagee of the interest of defendant No. 1 alone, could not redeem his mortgage and bring the property to sale. In the court of first instance, the defendant No. 2 prayed for an adjournment, which was refused and the plaintiff's suit was decreed. On appeal to the District Judge, he, on the 20th May 1908, delivered a judgment holding that there was no cause shown for an adjournment, and also deciding the other points against the defendant No. 2, but adding:—"I defer passing a decree in this appeal for two months in order to give plaintiff an opportunity of producing a succession certificate." On the 25th May 1908, however, the District Judge passed an order remanding the case to the court of first instance on the ground that as the defendant No. 2's prayer for an adjournment had not been granted, he had not had a sufficient opportunity of presenting his case. The plaintiff appealed.

The Hon'ble Pandit *Sundar Lal,* for the appellant, contended that the court below had no jurisdiction to go behind the judgment recorded by it on the 20th May 1908. Section 202 of the Code of Civil Procedure forbade the alteration of a judgment.

* First Appeal No. 83 of 1908, from an order of H. J. Bell, District Judge of Aligarh, dated the 25th of May 1908.

1908

KISHAN KUNWAR v. GANGA PRASAD.

The Judge had simply deferred passing the decree, until a succession certificate was produced. He had no power to re-open the matter and deliver an altogether fresh judgment.

Dr. *Satish Chandra Banerji* (with him Babu *Benoy K. Mukerji*), for the respondent, submitted that the case was not finally disposed of on the 20th May 1908. It was still on the list of pending cases. No decree was framed on the basis of the writing dated the 20th May 1908. It was therefore not a 'judgment' within the meaning of the definition in section 2 of the Code.

The only judgment in the case was that dated the 25th May 1908. So long as a case was pending in a court, the court had sei-in of it, and if it found that an opinion expressed by it at a former stage was erroneous, it could give effect to its reconsidered opinion when disposing of the case finally. Here the Judge himself stated that all the facts were not fully present before his mind on May 20th.

After an appellate court has expressed an opinion and remitted issues to the lower court, which records findings on those issues, the appellate court can re-open the case and decide it without reference to those findings. He referred to *Lachman Prasad* v. *Jamna Prasad* (1) and *Amir Kazim* v. *Zainab Begam* (2).

RICHARDS and GRIFFIN, JJ.—This was a suit on foot of a mortgage. The plaintiff's mortgage was dated the 18th of January 1901. Defendant No. 1 was the executant of the mortgage. Defendant No. 2 held a prior mortgage from the same mortgagor. He also held a second mortgage from the same mortgagor and also alleged that he held a third mortgage from him. The court of first instance decreed the suit. Defendant No. 2 alone appealed. His grounds of appeal to the lower appellate court were that he had not had sufficient opportunity to present his case, and that he had applied to the court of first instance to adjourn the case, which that court refused to do. The matter having come up for trial to the lower appellate court, judgment was delivered on the 20th of May 1908. The court in the clearest possible way decided that defendant No. 2 had had sufficient opportunity in the court below. The judgment goes into the entire facts of the case. It deals with all

(1) (1887) I. L. R., 10 All., 162. (2) Weekly Notes, 1897, p. 152.

1908

KISHAN KUNWAR v. GANGA PRASAD.

the objections of defendant No. 2. It was, however, necessary for the plaintiff before a decree could be passed in her favour that she should produce a certificate to collect debts as the heir of the original mortgagee. The concluding words of the judgment are—" following the course adopted by the High Court in *Abdul Karim Khan* v. *Maqbul-un-nissa* (1), I defer passing decree in this appeal for two months in order to give the plaintiff an opportunity of producing the certificate " This judgment is duly signed and dated, and it is impossible to read it without seeing that the Judge intended it to be a complete judgment. He merely deferred passing the decree for production of a certificate to collect debts. He did not even adjourn the case. Five days afterwards the court delivered a second judgment and made an order remanding the case to the court of first instance.

This judgment is inconsistent with the first judgment. According to the first judgment nothing remained to be done except to pass a decree. According to the second judgment the learned District Judge was to pass no decree at all but remanded the case to the court of first instance. Section 202 of the Code of Civil Procedure provides that as soon as a judgment is dated and signed by the Judge in open court it must not be altered or added to, save to correct verbal error or to supply some accidental defect not affecting a material part of the case, or on review. In view of these provisions of the Code, we think that the order of the Court below was illegal. We accordingly allow the appeal, set side the order of the court below, and remand the case, directing the learned District Judge to deal with the case in accordance with his judgment of the 20th May 1908. The appellant will have his costs.

Appeal decreed.

(1) (1908 I. L. R., 30 All., 315.

1908

GANGA DAYAL v. MANI RAM.

of one Baji Lal, who died on the 19th of August 1884. After his death, his widow, Musammat Parbati, was appointed guardian of the persons and property of the plaintiffs, who were then minors. An application was then made to the court for leave to sell a 5 anna 4 pie share in the village and a 7 anna 4 pie share in another village. The District Judge sanctioned this sale on the terms that the defendant No. 1 in this suit, Mani Ram, should give a clear receipt for all that was due to him. The consideration for the sale was to be Rs. 8,400. Instead of carrying out this sale, a sale of a totally different nature was made. The property sold was not the same property which the Judge did give permission to sell, and instead of the minors' getting a clear receipt for all debt that was due to Mani Ram, a sum of Rs. 1,000 only was placed to their credit. It would appear that Mani Ram and the defendants Nos. 2 and 3 had also a mortgage of a part of the property. This they foreclosed, although it was the intention of the sale which the Judge had permitted that the mortgage should be extinguished, at least so far as the minors and their property were concerned. This sale took place on the 28th of April 1886. The plaintiff No. 1 attained majority, according to the finding of the court below, more than 15 years before the institution of the present suit. The suit, however, was brought within three years of the plaintiff No. 2 attaining his majority. In the lower appellate court the suit was determined on the question of limitation, the learned Judge being of opinion that inasmuch as plaintiff No. 1 was of full age he was entitled "to give a discharge" within the meaning of section 8, Limitation Act, and that accordingly the right of plaintiff No. 2 was also barred.

Section 18 of Act XL of 1858 (which was in force at the date of the sale to Mani Ram) provided that no such person (*i. e.* the guardian) shall have power to sell or mortgage any immovable property, or to grant a lease of the estate for any period exceeding five years without an order of the civil court previously obtained. The sale which Musammat Parbati was induced to make was not in any sense the sale sanctioned by the District Judge. Section 30 of Act No. VIII of 1890 provides that the disposal of immovable property by a guardian in contravention of certain provisions of that Act is *voidable.* The older Act contains no

corresponding provision, and in our judgment the sale by Musammat Parbati was absolutely null and void. The only question accordingly that we have to decide is whether or not the plaintiffs are entitled to the benefit of the provisions contained in the last portion of section 8, Limitation Act, No. XV of 1877. That section provides as follows:—"when one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." The cause of action in the present case unquestionably arose when the defendants took possession in 1886. Section 7 of the last-mentioned Act appears to apply to the case of a sale, plaintiff or applicant being under some disability or to the case of all plaintiffs or applicants being under disability. The section was so construed by a full Bench of the Madras High Court in the case of *Periasami* v. *Krishna Ayyan* (1) and accordingly plaintiffs cannot succeed unless they come under the provisions of section 8 and can show that neither of them was capable of giving a discharge without the concurrence of the other. It is a little difficult to understand the meaning of the expression when "a discharge can be given without the concurrence of such person," and we may note that the word "claimants" in section 8 has been omitted from the corresponding section of the new Limitation Act, No. IX of 1908.

As a member of a joint Hindu family, it is quite clear that the plaintiff No. 1 could not have sued alone to recover possession of the joint property. If his brother did not join as plaintiff, it would have been necessary for him to take advantage of the provisions of the Code of Civil Procedure and to make him a defendant. It is equally clear that the plaintiff No. 1 could not have sold or mortgaged the property without the concurrence of his brother plaintiff No. 2. One case cited was *Vigneswara* v. *Bapayya* (2). That was a suit by two sons to set aside the sale on the ground that it was illegal as contravening the provisions of section 99, Transfer of Property Act. The suit was clearly

(1) (1902) I. L. R., 25 Mad., 431. (2) (1893) I. L. R., 16 Mad., 436.

1908

GANGA DAYAL v. MANI RAM.

not brought in time so far as one of the plaintiffs was concerned and the court decided that the claim of the other brother was also barred, apparently upon the ground that the elder brother could have sued and compromised the suit. It was argued that the elder brother, if he did sue, could not have compromised the suit. The learned Judges pointed out that the elder brother could have sued making his younger brother a co-plaintiff and then compromised the suit with the sanction of the court. It seems to us that the very fact that it would be necessary to obtain leave of the court shows that the elder brother could not have given a good discharge without the concurrence of his brother within the meaning of the section. It is further argued in the present case that the plaintiff No. 1 must be deemed to be the managing member of the family who would have a right to give a discharge. The powers of the manager of a Hindu family are undoubtedly very extensive, but there is nothing in the present case to show that the plaintiff No. 1 ever acted as the manager. In the present case all that he did was to remain quite inactive without taking any step to recover possession of the property or to set aside the transaction which was completely against the interest of himself and his minor brother. On the whole we have come to the conclusion that the plaintiff No. 1 was not capable of giving a discharge without the concurrence of plaintiff No. 2 within the meaning of section 8 of Act XV of 1877. The consequence is that time did not run against either of the plaintiffs and the suit is maintainable. As the case was decided on a preliminary point by the lower appellate court, we allow the appeal, set aside the decree of the court below and remand the case for disposal of the other issues. Costs here and hitherto will abide the result.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
December 22.

GAJADHAR AND ANOTHER (DEFENDANTS) *v.* KAUNSILLA (PLAINTIFF).*

Hindu law—Hindu widow—Maintenance—Remarriage of widow—Act No. XV of 1856.

During the life-time of her husband the wife of a Hindu obtained a decree for maintenance against him, and the payment of this maintenance was by the decree made a charge on certain property which had been of the husband, but was then in the hands of certain donees from him. The husband died, and the widow, being permitted to do so by the rules of her caste *(Halwai)*, married again.

Held that the fact of the widow having married again did not disentitle her from recovering maintenance from the property of her first husband. *Matungini Gupta* v. *Ram Rutton Roy* (1), *Rasul Jehan Begum* v *Ram Surun Singh* (2), *Vithu* v *Govinda* (3), *Panchappa* v. *Sanganbasawa* (4), *Murugayi* v. *Viramakali* (5), *Har Saran Das* v. *Nandi* (6), *Dharam Das* v. *Nand Lal Singh* (7) and *Ranjit* v. *Radha Rani* (8), referred to.

THE facts of this case are as follows:—

The plaintiff, Musammat Kaunsilla, had on September 6, 1881, obtained a decree in a suit for maintenance brought by her against her husband and certain other persons to whom her husband had sold or gifted his property.

The material part of the decree was as follows:—

"It is accordingly decreed that the plaintiff do obtain a maintenance of Rs 5 a month and Rs. 150 as arrears up to the date of suit; that she do recover the said amount of maintenance and arrears from the defendant No. 1 and from the two houses in suit; that she be declared entitled to reside in that portion of the house No. 1 which is not in the occupation of Salig Ram, tenant, and the deed of gift and the sale-deed, so far as they affect the plaintiff's right of maintenance and residence, be declared void."

The husband died some time after this, and the transferees continued paying the maintenance. In 1905, however, Musammat Kaunsilla, who was then a widow, according to a custom recognised in her caste *(Halwai)* remarried, and the transferees of her husband then stopped the allowance. She, thereupon, brought the present suit against the defendants for arrears of maintenance. The court of first instance (Munsif of Allahabad)

* Appeal No. 33 of 1908, under section 10 of the Letters Patent.

(1) (1891) I. L. R., 19 Calc., 289.
(2) (1895) I. L. R., 22 Calc., 589.
(3) (1896) I. L. R., 22 Bom., 321.
(4) (1899) I. L. R., 24 Bom., 89.
(5) (1877) I. L. R., 1 Mad., 226.
(6) (1889) I. L. R., 11 All., 330.
(7) Weekly Notes, 1889, 78.
(8) (1898) I. L. R., 20 All., 476.

1908

GAJADHAR
v.
MUSAMMAT
KAUNSILLA.

decreed the claim. The lower appellate court (Small Cause Court Judge with powers of a Subordinate Judge) modified the decree by dismissing the claim in respect of that portion of the arrear which had accrued due since the date of remarriage.

The plaintiff appealed, and KNOX, J., reversed the decree of the lower appellate court and restored that of the first court. The judgment is reported in the Weekly Notes for 1908, p. 149, s.v. *Kaunsilla* v. *Gajadhar*. The defendants appealed under section 10 of the Letters Patent.

The Hon'ble Pandit *Sundar Lal* (with him Babu *Durga Charan Banerji*), for the appellants contended that according to Hindu conception marriage is a sacrament. Its effect is to unite the husband and wife and to transfer the latter into the *gotra* of the former so that the two persons become one person. When the husband dies he is considered as surviving in the wife. She gets maintenance as the wife or widow, as the case may be, of the person to whom she was married. If she does some act whereby a change occurs in her status as such, the right to get maintenance also comes to an end. Remarriage, it is submitted, is one of such acts being, as it is, a complete severance of her connection with the family of her husband. According to the doctrine of Hindu law it is civil death, and its effect upon the right to get maintenance is the same as if she were actually dead. The decree that was given to her was in her capacity as the wife of her husband, and when she ceased to be that wife her right also ceased. As the widow of her former husband she would get maintenance, but that character also is lost when she remarries. The right to receive maintenance being a recurring right, subsequent conduct although not positive unchastity, would entail its forfeiture. As authority for this position reliance was placed upon West and Buhler's *Hindu Law*, 2nd edition, Vol. II, p. 999.

The Act XV of 1856 only legalises remarriage of widows, but does not take into consideration the consequences that would arise from such remarriage. The general principles of Hindu law would apply. *Murugayi* v. *Viramakali* (1).

The cases in this High Court as to the effect of the Act have not been approved of by the other High Courts, and there is a

(1) (1877) I. L. R., 1 Mad., 226.

catena of authorities, Full Bench and other authorities. Reliance was also placed upon the remarks of RANADE, J., in *Panchappa* v. *Sanganbasawa* (1).

The ground on which the obligation to pay maintenance rests is, in the case of the husband, moral and, in that of the father-in-law who has property of the husband in his hands, legal. That being the correct principle, it is submitted that the right and the relationship are co-ordinate: with the cessation of the one, the other also goes. Reliance was placed, besides the cases cited in the judgment, upon *Surampalli Bangaramma* v. *Surampalli Brambaze* (2).

In the present case, the second husband is the person under obligation to maintain his wife, by reason of the connection. The former husband and the person deriving title through him are absolved, as the plaintiff cannot be regarded either the wife or the widow of her former husband.

Babu *Sital Prasad Ghose* (with him Babu *Mangal Prasad Bhargava*), for the respondent.

The case has been argued on the supposition of those cases which relate to the three higher castes among whom marriage is a sacrament. The parties are *Halwais*, and that strict view of the marriage tie does not prevail among them. Remarriage is sanctioned by custom among them. Further, a court of justice has declared the plaintiff's right to receive maintenance and made it a charge upon the property. Unless something in the texts or in decided cases is shown limiting or extinguishing this right, she cannot be deprived of it.

[He read from p. 95 in I. L. R., 24 Bom., and submitted that the case was no authority for the particular point.]

In the absence of such authority what the appellants can invoke in aid of their position is the text of *Narada*, in which the only case which will entail the forfeiture of the right of maintenance is that of the wife's not "keeping unsullied the bed of her lord." In the caste to which the parties belong it cannot be said that by remarriage the widow has not kept the bed of her lord unsullied, remarriage being lawful among them. The case in I. L. R., 1 Mad., 226, has no bearing. There being a decree

(1) (1899) I. L. R., 24 Bom., 89. (2) (1908) I. L. R., 31 Mad., 338.

1908

GAJADHAR
v.
MUSAMMAT
KAUNSILLA.

of court the fact of her remarrying will not nullify it, unless the decree so provided.

The Hon'ble Pandit *Sundar Lal* replied.

BANERJI, J.—The question in this appeal is whether a Hindu widow, who according to the custom of her caste is allowed to re-marry, forfeits upon remarriage her right to the maintenance decreed to her against the estate of her first husband.

The plaintiff, Musammat Kaunsilla, belongs to the caste of *Halwais* or confectioners. She was first married to one Sahtu and in 1881 brought a suit against him and transferees from him for her maintenance. On the 6th of September 1881 a decree was passed in her favour fixing Rs. 5 a month as her maintenance, which was declared to be a charge on the estate of her husband in the possession of certain donees from him. The husband died subsequently, but the transferees of the property continued to pay her the maintenance decreed to her. In 1905 she married a second time and thereupon the defendants who are in possession of the property refused to pay the maintenance. She accordingly brought the present suit for recovery of arrears of maintenance by sale of her first husband's property now in the hands of the defendants. It has been found that according to the custom of the caste to which she belongs remarriage is permissible and is valid. The defendants contended that by marrying a second time she forfeited her right to maintenance. The court of first instance decreed her claim in part. The lower appellate court set aside that decree and dismissed her suit. Upon second appeal to this court the learned Judge who heard it reversed the decree of the lower appellate court and restored that of the court of first instance. From his judgment this appeal has been preferred under the Letters Patent. It is urged on behalf of the appellants that Act No. XV of 1856 applies to the case and that under section 2 of the Act the plaintiff by marrying a second time forfeited her right to maintenance from the estate of her first husband. It is also contended that remarriage dissolves the relationship between the widow and the family of her first husband and as the right to maintenance is founded on relationship, it ceases as soon as the relationship is put an end to by

remarriage. In support of these contentions the learned Advocate for the appellants relied on the rulings of the Calcutta High Court in *Matungini Gupta* v. *Ram Rutton Roy* (1) and *Rasul Jehan Begam* v. *Ram Surun Singh* (2); of the Bombay High Court in *Vithu* v. *Govinda* (3) and *Panchappa* v. *Sanganbasawa* (4) and of the Madras High Court in *Murugayi* v. *Viramakali* (5). He also referred to West and Buhler's *Hindu Law*, Vol. II, p. 999.

Had the question not been concluded by the rulings of this court I should be inclined to accede to the contentions of Pandit *Sundar Lal*. But as the course of rulings in this court has been uniform, I feel myself bound by those rulings whatever my personal opinion may be. In *Har Saran Das* v. *Nandi* (6) it was held by STRAIGHT and BRODHURST, JJ., that a widow belonging to the sweeper caste, in which there was no obstacle against the remarriage of widows, did not by marrying again forfeit her interest in the property left by her first husband and that Act No. XV of 1856 did not apply to the case of such a widow. A similar view was held by STRAIGHT and TYRELL, JJ., in *Dharam Das* v. *Nand Lal Singh* (7), which was the case of a widow belonging to the Ahir caste. In the case of a widow of the Kurmi caste, *Ranjit* v. *Radha Rani* (8), BLAIR and AIKMAN, JJ., followed the above rulings and observed :—"Several unreported cases have all been decided in this court in the same way. We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent *cursus curiæ* in this court." According to these rulings not only is Act No. XV of 1856 inapplicable in the case of a widow who is permitted by the custom of her caste to remarry, but she does not forfeit the property inherited by her from her first husband. The effect of these rulings, therefore, is that the relationship with the family of her first husband does not come to an end, and she does not by remarrying forfeit her right to maintenance. Unchastity may entail a forfeiture of her right to maintenance, but it cannot be said that a widow who has married again has thereby become unchaste. I may observe that Mr. *Sundar Lal* has not based his contention on this ground.

(1) (1891) I. L. R., 19 Calc., 289.
(2) (1895) I. L. R., 22 Calc., 589.
(3) (1896) I. L. R., 22 Bom., 321.
(4) (1899) I. L. R., 24 Bom., 87.
(5) (1877) I. L. R., 1 Mad., 226.
(6) (1889) I. L. R., 11 All., 330.
(7) Weekly Notes, 1889, p. 78.
(8) (1898) I. L. R., 20 All., 476.

1908

GAJADHAR
v.
MUSAMMAT
KAUNSILLA.

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(1) (1891) I. L. R., 19 Calc., 289.
(2) (1895) I. L. R., 22 Calc., 589.
(3) (1896) I. L. R., 23 Bom., 321.
(4) (1899) I. L. R., 24 Bom., 57.
(5) (1877) I. L. R., 1 Mad., [illegible]
(6) (1889) I. L. R., 11 All., [illegible]
(7) Weekly Notes, 1889, [illegible]
(8) (1898) I. L. R., 20 All., [illegible]

1908

HAR PRASAD v. RAGHUNANDAN PRASAD.

mortgaged is a five-biswa share in the village Meadi Khurd. A two-biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January, 1890. To this mortgage Shib Lal, the father of Har Prasad, defendant, was also a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad, had paid to Ghumi Mal before they could bring to sale a two-biswa share of the village Meadi Khurd. This contention was overruled by the court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal; and second that even if he acquired a charge he could not enforce it against the plaintiffs, who were puisne mortgagees. The correctness of these findings is impugned in this appeal which was brought by Har Prasad.

The lower court's view that a mortgagor, who discharges a simple mortgage, does not thereby acquire a charge on the property of his co-mortgagor comprised in the mortgage for a *rateable share of the debt*, is clearly erroneous. By virtue of the provisions of sections 82 and 100 of the Transfer of Property Act a charge is acquired by a co-mortgagor redeeming a mortgage. This was held in *Bhagwan Das* v. *Har Dei* (1). If therefore Har Prasad, who upon the death of his father, Shib Lal, became the co mortgagor of Piare Lal in respect of the mortgage of the 6th of January, 1890, discharged that mortgage, he acquired a right to *obtain* contribution from Piare Lal and a charge *for* the amount of the contribution on Piare Lal's two-biswa share.

The next question is whether this charge can take priority over the plaintiffs' mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired we think priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee or the purchaser of the equity of redemption who pays off a prior mortgage, acquires, on equitable grounds, priority over a puisne

(1) (1903) I. L. R., 26 All., 227.

mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt he discharges, a co-mortgagor is equally subrogated. It was held by this Court in *Pancham Singh* v. *Ali Ahmad* (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee. The same rule is applied by the courts in America. It is thus stated in Jones on *Mortgages*, Vol. I, para. 877 :—" When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances . . . . In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it." In the present case Har Prasad, who was one of the mortgagors, was entitled to redeem Ghumi Mal, but he was under no obligation as between himself and Piare Lal to pay the latter's share of the debt. He could not redeem the mortgage piecemeal and was therefore bound to pay the whole amount of the mortgage. If he paid that amount he was by such payment subrogated to the rights of the mortgagee and was entitled to priority over the subsequent mortgagees, who appear from their mortgage deed to be the sons of the prior mortgagee whose prior mortgage is mentioned in that deed. We have not been referred to any authority in support of the view of the learned Subordinate Judge. For the reasons

(1) (1881) I. L. R., 4 All., 58.

1908

HAR PRASAD v. RAGHUNANDAN PRASAD.

stated above we hold that if Har Prasad discharged the mortgage of the 6th of January, 1890, he acquired priority over the plaintiffs, as regards two biswas of Meadi Khurd, to the extent of the proportionate liablity of that property for the mortgage debt. The court below has not found whether he has paid off that debt, and, if he has done so, what is the proportionate amount of liability of the aforesaid share for that debt. We accordingly refer the following issue to that court under the provisions of section 566 of the Code of Civil Procedure :—

Did Har Prasad pay the amount due upon the mortgage of the 6th of January, 1890, and if so, for what portion of that amount was the two-biswa share of the village Meadi Khurd comprised in that mortgage proportionately liable ?

The court below will take such additional evidence relevant to the above issue as may be necessary. On receipt of its findings ten days will be allowed for filing objections.

Cause remanded.

9301
January 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HAMID-UN-NISSA BIBI (PLAINTIFF) *v.* NAZIR-UN-NISSA AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act, section 53—Transfer with intent to defeat or delay creditors—Muhammadan law—Transfer by Muhammadan to one of his wives with intent to defeat claim of the other for dower.

A few days after the institution of a suit against him by his first wife for recovery of her dower, a Muhammadan, who had two wives, transferred the bulk of his property to his second wife in satisfaction of her claim for dower. *Held*, on suit by the first wife to have the transfer above mentioned set aside, that such transfer was not necessarily unimpeachable, but that it was necessary to find, first, that the transfer was a real, and not merely a colourable transaction ; and, secondly, that the second wife had not combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claim of the first wife.

THE facts out of which this appeal arose are as follows :—

One Ali Jawad had two wives, Hamid-un-nissa and Nazir-un-nissa. On the 1st December 1904, Hamid-un-nissa

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* Second Appeal No. 1324 of 1907, from a decree of C. Rustomjee, District Judge of Allahabad, dated the 3rd June 1907, confirming a decree of Raj Nath Sahib, Subordinate Judge of Allahabad, dated the 16th of May, 1906.

filed a suit against Ali Jawad for the recovery of her dower debt. On the 6th December 1904, Ali Jawad transferred substantially the whole of his property to his second wife Nazir-un-nissa. On the 22nd of February 1905 Hamid-un-nissa in her suit for dower obtained a decree for Rs. 5,000 and proceeded to execute her decree by attachment of property which was the subject of Ali Jawad's gift to his second wife. Nazir-un-nissa successfully objected to the execution of her co-wife's decree, and in consequence the present suit was brought for a declaration that the transfer of his property by Ali Jawad to Nazir-un-nissa was void. The Court of first instance (Subordinate Judge of Allahabad) dismissed the suit, and this decree was on appeal confirmed by the District Judge, mainly with reference to the following cases: *Suba Bibi* v. *Balgobind Das* (1), *Khodija Bibi* v. *Shah Muhammad Zaki Alam* (2) and *Umrao Singh* v. *Kaniz Fatima* (3). The plaintiff appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit brought by the first wife of the defendant Ali Jawad for a declaration that a transfer made by him on the 6th of December, 1904 substantially of all his property in favour of his second wife was void against her. It appears that the appellant, Hamid-un-nissa Bibi, demanded her dower from her husband and instituted a suit for the recovery of it on the 1st of December 1904. Five days after the institution of this suit Ali Jawad made the transfer which is impeached in this suit. On the 22nd of February 1905 the plaintiff appellant obtained a decree for her dower amounting to Rs. 5,000, and forthwith proceeded to execute her decree. She was resisted by the defendant respondent, Musammat Nazir-un-nissa, and in consequence the suit out of which this appeal has arisen was instituted.

The court of first instance dismissed the plaintiff's claim. Upon appeal the learned District Judge affirmed the decision of the court below

(1) (1886) I. L. R., 8 All., 178. (2) Weekly Notes, 1901, p. 64. (3) Weekly Notes, 1901, p. 67.

1903

HAMID-UN-NISSA BIBI v. NAZIR-UN-NISSA.

The main ground of that appeal was that the deed of transfer in question was a collusive and fictitious document, and that the dower of the defendant was only 500 *dirhams* and not, as she alleged, Rs. 20,000. As regard the amount of the dower both courts find that the dower of the defendant, Nazir-un-nissa was Rs. 20,000, but the learned District Judge finds that the impeached deed of transfer was undoubtedly a device on the part of Ali Jawad to deprive his first wife of the fruits of her victory in her suit for dower. He refers to a number of authorities and observes :—"Taking the trend of all these rulings I am of opinion that the deed of gift cannot be looked upon as a fraudulent transaction." He then says—"At the time of the gift the dower of the second wife was still due to her and constituted a valid debt in payment of which he could under the law make a valid gift of all his property to her," and then he observes:—"I must therefore hold that in law the transaction is unimpeachable." Now it may be true that a transfer by Ali Jawad to his second wife of all his property in satisfaction of her dower may be a valid and unimpeachable transaction, but that is not the sole question for determination. Having found that the transfer to his second wife was made by Ali Jawad for the purpose of defeating his first wife's claim and depriving her of the fruits of her successful litigation, it was necessary for the learned District Judge to determine whether or not the second wife was a party to the improper conduct of her husband. In other words whether or not she combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claims of the first wife. *If she did so combine,* she would not be a transferee in good faith. It was further alleged that there was in reality no real and genuine transfer by the husband to his second wife. Before therefore we can determine this appeal we must have definite findings upon the following two issues :—

(1) Whether the transfer of the 6th of December 1901, was a real transaction or merely colourable?

(2) Was the defendant Nazir un-nissa a transferee of the property comprised in that transfer in good faith?

We refer the above issue to the learned District Judge under order 41, rule 25, Civil Procedure Code. These issues he will determine upon the evidence already before him. On return of the findings the parties will have the usual ten days for filing objections.

Issues remitted.

1909
January 8.

Before Sir John Stanley, knight, Chief Justice, and Mr Justice Banerji.
RAM KUMAR SINGH (DEFENDANT) v. ALI HUSAIN AND OTHERS (PLAINTIFFS) *

Suit for damages against joint tort feasors—Compromise between plaintiff and one of the defendant—such compromise no bar to a decree against the other defendants

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants *Held* that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. *Brinsmead* v. *Harrison* (1) and *Thurman* v. *Wild* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of RICHARDS, J. The facts are stated in the judg[illegible] [illegible]fore the institution of the present suit criminal proceedings had been commenced against some 12 persons, with the result that 8 out of 12 were convicted. The criminal proceedings were followed by the present proceedings in the Civil Court for damages against the same 12 persons. Before the suit was tried one of the four persons who had been acquitted by the Criminal Court entered into a compromise with the plaintiff. The suit then proceeded against the remaining defendants, with the result that a decree was given against the same 8 persons who had been convicted by the Criminal Court. The only plea argued in the present appeal is that the compromise by one of the defendants, to which I have referred above, barred the plaintiff's right to a decree against the other defendants or any of them. The appellant relies upon Pollock on Torts, 7th edition, p. 194.

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* Appeal No 45 of 1908 under section 10 of the Letters Patent.

(1) (1872) L. R., 7 C. P., 547. (2) (1840) 11 A and E., 453.

1909

RAM KUMAR SINGH v. ALI HUSAIN.

He also cites the case of *Brinsmead* v. *Harrison* (1) in which it was held that a judgment recovered against one of several joint tort-feasors is a bar to an action against the others for the same cause. It is contended that the compromise is analogous and equivalent to the recovery of a judgment. In my opinion this contention is not correct. The principle on which the case of *Brinsmead* v. *Harrison* was decided was that the plaintiff's cause of action had merged in the judgment on the principle of *transit in rem judicatam*. In my opinion there is no force in this ground of appeal which is the only ground pressed. It must also be remembered that the compromise was confined to the particular defendant with whom it was made. I accordingly dismiss the appeal with costs.

"The objections under section 561 of the Code of Civil Procedure cannot be sustained and are dismissed with costs."

The same defendant appealed. On this appeal—

Babu *Satya Chandra Mukerji* for the appellants, contended that, since the plaintiff had accepted Rs. 25 from one of the defendants and had exempted him, he could not maintain his claim as against the other defendants. The act of the plaintiff amounted to a release of the other defendants. He cited *Underhill* on Torts, pp. 112 & 113, *Pollock* on Torts, 7th edition, p. 194, *Brinsmead* v. *Harrison* (1) and *Thurman* v. *Wild* (2).

Mr. *Muhammad Ishaq Khan*, for the respondent, was not called upon.

STANLEY, C.J. and BANERJI, J:—The circumstances under which this appeal has arisen are as follows. The plaintiff, Sheikh Ali Husain, was mercilessly beaten by some persons including some of the defendants in this suit. Thirteen persons were prosecuted for this assault, with the result that eight were convicted. After the conviction of these parties the plaintiff instituted the suit out of which this appeal has arisen for damages for the injuries sustained by him at the hands of his assailants. He claimed a sum of Rs. 325. Amongst the defendants were the 8 persons who were convicted of the assault. During the progress of the case one of the defendants admitted that the assault had been

(1) (1872) L. R., 7 C. P., 547. (2) (1840) 11 A. and E., 453.

committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff's claim as against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff's claim against the other defendants could not be sustained. Reliance was placed upon the leading case of *Brinsmead* v. *Harrison* (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of *Brinsmead* v. *Harrison*, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit

(1) (1872) L. R., 7 C. P., 547.

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APRIL 1909.

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INDEX.



PAGE.

place in contravention of section 99 of the Transfer of Property Act and was void.

RICHARDS and GRIFFIN, JJ.—It appears that the decree-holders held a mortgage decree as well as a simple money decree against the same judgment-debtors. An application was made for the attachment and sale of the mortgage property in execution of the money decree. The property was attached, but no sale took place. The decree holders then applied to sell the property in execution of the mortgage decree, which was a decree absolute for sale of the mortgaged property. While these proceedings were pending and before the sale was held, the court was asked to sell the property for the realization of the amounts of both the decrees. The property was then sold and was purchased by the appellant, who was not a party to either of the decrees. An application was then made by the judgment debtors to set aside the sale. The court below was of opinion that the sale was null and void on account of the order for sale to realize the amount of both the decrees. The court below seems to have been of opinion that the provisions of section 99 of the Transfer of Property Act were contravened, and refused to confirm the sale, without deciding the other grounds of objection put forward by the judgment-debtors. Hence the present appeal. It seems to us that the court below did not realize that there had been a decree absolute for the sale of the mortgaged property. Section 99 of the Transfer of Property Act is as follows:—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43." In the present case the decree-holder had instituted a suit under section 67. In our opinion there was nothing irregular in selling the property for the amounts of the two decrees. Mr. *Sundar Lal* who appears for the respondent has been unable to cite any authority for the proposition that such sale is irregular. We allow this appeal, set aside the order of the court below, and remand the case under the provisions of section 562 of the Co-

1908

BEHARI BHARTHI *v.* BHAGWAN GIR.

of Civil Procedure, for determination of the remaining objections. The appellant will have his costs of this appeal. Other costs will be dealt with by the court hearing the appeal.

Appeal allowed and cause remanded.

PRIVY COUNCIL.

* P. C. 1908 *October* 30, *November* 6, 10, *December* 15.

KISHORI LAL, (DEFENDANT) *v.* CHUNNI LAL (PLAINTIFF).

and another appeal consolidated.

[On appeal from the High Court at Allahabad].

Evidence—Proof of adoption—Illiterate pardanashin widow lady—Non-appearance of plaintiff in Court as witness—Absence of any account of expenditure on ceremony—Mode of carrying on business—Inability to give date of adoption—Inconsistent and contradictory evidence—Practice for each litigant to cause his opponent to be cited as a witness.

Where the question on an appeal was whether his claim to be the adopted son of an illiterate pardanashin widow lady had been established by the respondent, who lived in her house and was the manager of her business consisting mostly of "zamindari and money dealings," and on whom the burden of proof rested.

Held by the Judicial Committee (reversing the decision of the High Court) that having regard to the contradiction between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; the absence of all reference to the date of the adoption; and above all the non-production of any account of expenditure at the ceremony, which, if his witnesses spoke the truth, must have been notorious in the neighbourhood where it took place, the respondent had failed to discharge the burden of proof which lay upon him, and had not established his claim.

The practice common in litigation in the United Provinces in India for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client, disapproved of by their Lordships of the Judicial Committee as resulting in the embarrassment of litigation, and as being a practice which judicial tribunals ought to set themselves to render as abortive as it is objectionable.

TWO appeals, 46 and 47 of 1907, consolidated from a judgment and decrees (12th July 1904) of the High Court of Judicature at

* *Present*:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

Allahabad, which reversed a judgment and decrees (7th February 1902) of the Court of the Subordinate Judge of Aligarh.

The principal question raised on these appeals was whether the respondent Chunni Lal was validly adopted by a lady named Musammat Lachchho as son to her husband Dwarka Das.

The facts of the case are sufficiently stated in their Lordships' judgment.

Chunni Lal from 1891 until July 1899 used to manage the lady's business which consisted largely of "zamindari and money dealings." On 29th July 1899 Musammat Lachchho executed a deed of endowment of certain property, and two powers of attorney to enable mutation of names to be made of the endowed property. In these documents Chunni Lal also entered his own name as her adopted son. The deed of endowment was registered and in consequence publicity was given to the claim advanced by Chunni Lal. His adoption was immediately challenged by the appellant Kishori Lal, a reversioner to the estate of Dwarka Das expectant on the death of his widow, who on 22nd September 1899 instituted a suit (out of which arose appeal 47 of 1907) against Musammat Lachchho and Chunni Lal, mainly for a declaration that the latter had not been validly adopted.

In defence Chunni Lal filed a written statement in which he alleged a formal adoption in the year 1877 made with the permission of Dwarka Das, and also pleaded a custom validating an adoption by the widow of a Bohra Brahmin even without her husband's authority. On 19th March 1900 a written statement was filed purporting to be the written statement of Musammat Lachchho. She obtained information of this some months later and on 29th December 1900 presented a petition repudiating the written statement already filed and denying that she had anything to do with it. On 2nd January 1901 she filed a written statement in which she denied that she had ever adopted Chunni Lal, that her husband had ever given her authority to adopt, and that the Bohra Brahmins were governed by a custom which validated an adoption without authority from the husband.

On 24th December 1900 the suit out of which arose appeal 46 of 1907 was instituted by Chunni Lal against Musammat Lachchho for a declaration of the validity of his adoption and for

1908

KISHORI LAL v. CHUNNI LAL.

possession of the estate of Dwarka Das; and to that suit Kishori Lal was added as a defendant. *Both defendants denied that the* adoption had ever been made.

The two cases were heard together.

The Subordinate Judge decided that Chunni Lal had not been adopted in fact; that Dwarka Das had not given any authority to adopt; and that the custom set up was not proved. He was of opinion that Chunni Lal and his father Maya Ram, were only karindas (agents) of Musammat Lachchho who had all along held possession of the estate. In accordance with these findings he made decrees granting Kishori Lal the relief claimed by him, and dismissing Chunni Lal's suit with costs.

Chunni Lal appealed from both decrees to the High Court and the appeals were heard by SIR J. STANLEY, C. J., and BURKITT, J., who came to the conclusion that Dwarka Das had given his wife authority to adopt and that she had in pursuance of that authority validly adopted Chunni Lal, and as a result decrees were made reversing the decrees of the Subordinate Judge, dismissing the suit of Kishori Lal, and granting Chunni Lal possession of the property in suit.

In the course of their judgment the High Court made the following remarks which are alluded to by their Lordships of the Judicial Committee:—

"The learned Subordinate Judge comments upon the fact that Chunni Lal himself did not come into the witness box. In this case a most objectionable practice which has become prevalent in these Provinces was adopted by the defendants. It has become a not uncommon practice for a plaintiff or defendant, as the case may be, to summon as his or her witness the opposite party. What the object of so doing is it is difficult to see, unless it be to lead the opposite party to keep out of the witness box until the case for his adversary is opened. Such a practice is obviously objectionable. A party should have the opportunity of presenting his case to the court in whatever way he may consider most favourable. This he cannot well do if he is first subjected to what amounts to a cross-examination at the hands of the pleader of the opposite party. There is also this danger that a witness so summoned may not be called at all, and so his case having already closed he is deprived of the benefit of his evidence unless the court permit his examination at that stage of the case. In the present case Chunni Lal though summoned by the opposite party was not called as a witness. We should always under such circumstances be disposed before determining an appeal to direct the examination of a party who has been so summoned and not called as a witness and whose evidence might be most material. We should have done so in the

present case; but for the fact that we are abundantly satisfied upon the evidence which has been adduced as to the side upon which truth lies. We therefore have not thought fit to put the parties to the delay and expense which would be consequent upon an adjournment of the case."

And after a full examination of the whole of the evidence in the case they concluded their judgment in the following terms:—

"We have then the following facts, as it seems to us, clearly established, namely, that Chunni Lal lived with Musammat Lachchho from the time of the alleged adoption, that his marriage and *janeo* expenses were defrayed at the expense of Musammat Lachchho, that the *dasthaun* ceremony of his son was likewise defrayed at her expense; that as adopted son he was appointed her *sarbarahkar* in 1891, that in some suits and bonds he is described as adopted son, that he has been managing her property since the death of his brother Deokaran, that he took part in the ceremonies connected with the dedication of the temple at Soron and in the *pole* ceremony two years later on, and that in the *tamliknama* by which the temple was endowed there is an express recital of his adoption and of the permission given by Dwarka Das to Musammat Lachchho to adopt. In addition to all these matters we have the evidence of a great number of respectable and well-to-do persons, caste-fellows and others, who testify to the fact of the adoption, and amongst others, Kashi Ram, the uncle of Chunni Lal, who is himself a reversionary heir of Dwarka Das, on the same level with Kishori Lal. This evidence appears to us to be overwhelming and decisive. It outweighs any inference which might be drawn from the fact that Chunni Lal was known by some persons at all events as the son of Maya Ram and was not known to have been adopted as a son of Dwarka Das, and from the fact that upon adoption mutation of names was not effected in his favour, but the property left in the ostensible ownership of Musammat Lachchho. The desire to have a son in the case of a Hindu is strong, and it is highly probable that Dwarka Das, who had married a young wife, no doubt in the hope of having a son, when he was disappointed in this hope would have given permission to his wives to adopt. The delay in carrying out the adoption does not appear to us unnatural as the learned Subordinate Judge seems to suppose. Musammat Lachchho, a young woman, might not unnaturally desire to retain control of her husband's property as long as possible and no inference unfavourable to the adoption can be drawn from the fact that she delayed the adoption for so many years. We are inclined to think that the key to this litigation is to be found in the answer already mentioned which Musammat Lachchho gave to a question in cross-examination and that answer is.—"Chunni Lal has acted against my wishes and I can tell him this to his face." Evidently there was a quarrel between them, and Musammat Lachchho, who is illiterate and probably not an over conscientious or truthful woman, judging from her evidence, determined to undo what she had done and repudiate the adoption. Possibly she thought that after the lapse of so many years Chunni Lal would not be able to procure satisfactory evidence of it."

1908

KISHORI LAL
v.
CHUNNI LAL.

On these appeals

De Gruyther, K.C. and *B. Dube*, for the appellant contended that on the evidence the adoption of the respondent by Musammat Lachchho was not proved. They pointed out that up to the year 1888 there was no trace to be found in any document of the adoption alleged. Musammat Lachchho had remained in possession of the estate, and was still in possession: her name had remained recorded as owner notwithstanding the alleged adoption, and still appeared as owner in the Collector's registers; and the business continued to be carried on in her name and for her benefit. The first mention of an adoption was to be found in a bond dated 16th June 1888 which purported to have been executed in favour of Musammat Lachchho and "of Chunni Lal her adopted son" This was followed on 17th December 1890 by three similar bonds executed in renewal of bonds in favour of Musammat Lachchho alone, being a date subsequent to the year of the alleged adoption. In later years there were a few other transactions of the same nature; and attention was called to the fact that as Chunni Lal, his father Maya Ram, and his brother Deokaran were managing the business for Musammat Lachchho they could at any time have obtained the insertion of Chunni Lal's name in certain renewed bonds without either her knowledge or consent; and it was in evidence that that was so in the case of the deed of endowment from the registration of which she first came to know that Chunni Lal claimed to be her adopted son. It was also the case that on every occasion from 1892 to 4th March 1899 when Chunni Lal had to give his parentage in public he invariably described himself as the son of Maya Ram, whereas if he had been in fact adopted he would have described himself as the son of Dwarka Das. Chunni Lal himself had not given evidence at all; important documents in his possession had not been produced; and many things that required explanation by him remained unexplained. Had the adoption been on the scale and as numerously attended as alleged it would have been an event well remembered in so small a place as the village where it was said to have taken place, and there would have been accounts of the expenditure, which would have been large, yet no such accounts were produced. Reference was made to the

Registration Manual, North-Western Provinces (1885), Part II, Rule 155 which provided that the Registrar should explain the terms of a document to pardanashin ladies and illiterate persons. But many of the documents had not been explained to Musammat Lachchho; in fact it was doubtful whether she ever saw many of them at all. There was no sufficient evidence that Dwarka Das gave any authority to his widows to adopt; and the custom as to such an adoption as is alleged being valid without her husband's permission was not established. It was also submitted that the High Court had failed to give due weight to the numerous admitted facts in the case, which were either wholly inconsistent with an adoption, or rendered it improbable that an adoption ever was made. Reference was made to *Meer Usdoollah* v *Beeby Imaman* (1), and it was submitted that the principles there laid down as to dealing with conflicting evidence should be applied to this case.

Ross for the respondent contended for (*inter alia*) the reasons given in the extract from the judgment of the High Court above set out that the adoption was fully proved by the evidence in the case, and particularly by the documents relating to the dedication of the temple at Soron. Reference was made to *Mutsaddi Lal* v. *Kundan Lal* (2), Mayne's Hindu Law, 7th edition, page 176, paragraph 137, *Chandra Kunwar* v. *Chaudhri Narpat Singh* (3) and *Lali* v. *Murlidhar* (4).

De Gruyther, K. C., replied.

1908 DECEMBER 15th:—The judgment of their Lordships was delivered by

LORD ATKINSON :—These are consolidated appeals from two decrees of the High Court of Judicature for the North-Western Provinces, Allahabad, dated the 12th July 1904, by which the decrees of the Subordinate Judge were reversed.

The main question for decision in the suits in which these decrees were pronounced, and the sole question for the decision of their Lordships on these appeals, is one of fact, namely, whether Musammat Lachchho, a *pardanashin* lady who is

(1) (1836) 1 Moo. I. A., 19, at p. 44.

(2) (1906) I. L. R., 28 All., 377; (382) L. R., 33 I. A., 55 (57)

(3) (1906) I. L. R., 29 All., 184; L. R., 34 I. A., 27

(4) (1906) I. L. R., 28 All., 488; (492) L. R., 33 I. A., 97 (101).

1908

KISHORI LAL v. CHUNNI LAL.

illiterate, the widow of one Dwarka Das, deceased, adopted with the permission or by the direction of her husband, given shortly before his death, the respondent, Chunni Lal, as his son. The burden of proving the adoption rested on him. The lady denies on oath most positively that she ever adopted the respondent. The Subordinate Judge held that the evidence showed he had not been adopted, and decided against him. The High Court decided in his favour. The case is a most perplexing one, but the difficulty which their Lordships have found in coming to any confident conclusion on the point on which the courts in India differed, does not arise so much from the direct conflict between the evidence of the witnesses examined on behalf of the respective parties, as from three matters for the latter two of which the respondent is entirely responsible, namely, (1) the non-production of any account-book containing items relating to the expenses of the ceremony of adoption, which, if his witnesses speak the truth, took place in the small village of Thulai, and was a prolonged and somewhat pompous function at which 1,000 guests were feasted; (2) the suppression of three day-books and three ledgers which were in his, the respondent's, custody and keeping, and (3) his non-appearance as a witness at the trial before the Subordinate Judge, though several transactions to which he was a party were proved to have taken place, which called imperatively on him for an explanation.

As to this last matter, it would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance.

The relations subsisting between Musammat Lachchho and the different members of the respondent's family, the

circumstances under which, and the manner in which, her business was carried on and her affairs managed, make the three above-mentioned facts all the more significant.

Dwarka Das, a resident of the village of Thulai, in the District of Aligarh, died in the year 1854 possessed of considerable movable and immovable property situate in this and some neighbouring villages, leaving his two widows, Musammat Jasoda and Musammat Lachchho, him surviving. He was a childless man. Musammat Jasoda, who was much the elder of the two widows, died in 1863. Musammat Lachchho, who had only been married in the year 1852, is still alive. Dwarka Das had a relative, a first cousin once removed, named Maya Ram, who at one time lived in the village of Punner, not far from Thulai. He was by Dwarka Das appointed agent to help in the management of the latter's affairs. After the death of Dwarka Das, Maya Ram continued to act as agent for the widows, and the survivor of them, Musammat Lachchho, up to the time, of his own death in the year 1891, residing with them for a portion of that time, and always taking his food where he did his work. Maya Ram had three sons, Deokaran, the eldest, Moti Ram, and Chunni Lal (the respondent). Deokaran was associated with his father in the management of the estate, and after his father's death continued to manage it up to the time of his own death in the year 1891, when the management was taken up by Chunni Lal, aided by Radha Kishan, who was appointed to assist in the business about six or seven years afterwards. Radha Kishan was married to the daughter of Deokaran, is the attorney of the respondent, superintends this litigation on the latter's behalf, and must therefore be privy to the suppression of the evidence above referred to.

On the 23rd April 1880 Musammat Lachcho executed a power of attorney in the widest possible terms, appointing Deokaran her attorney, empowering him (amongst other things) to institute and defend suits, receive rents, grant leases, release any debt, obtain in her favour any bond relating to money dealings, and to have the same registered, or to execute any bond on her behalf, or file in or take back any document from any court. The endorsement on this instrument describes her occupation as

1908

KISHORI LAL v. CHUNNI LAL.

"zamindari and money dealings." From documents put in evidence by the appellant, it is plain that Musammat Lachcho had money dealings with her customers in large amounts.

This business of hers appears to have been carried on in a portion of a house called the *haveli* house or *kothi*. At first Deokaran, like his father, took his meales in the *kothi*, and for a time apparently lived there. Subsequently Musammat Lachchho gave the site of a house for Deokaran, or had a house built for him, and from the time the house was built, father, son, and their families lived in it. The respondent, however, has lived in the lady's house for the last 25 or 26 years.

The mode in which her business was carried on was this: all moneys due were recovered and received by, and all disbursements made through the hands of, the agents, and as remuneration they received a certain share of the profits of the business, and were responsible for the loss of capital employed. This is clear from the uncontradicted evidence of Ganga Prasad, one of the appellant's witnesses, and from the extracts from the diaries filed on the latter's behalf. He states:—

"I used to come to examine the accounts kept by Maya Ram, Deokaran and Jai Singh . . . . Maya Ram had 2, then 2½ and, at the time of his death, 3¼ *rozgars*. The amount of one *rozgar* is Rs. 500 and profits are received on account of it. First the interest due to the banker is paid off, and then the profits are paid. If there is a loss, its amount is recovered from them (*gumasthas*). If there is a deficiency in the principal, it is made good. Deokaran had 2, then 2½, and then 3 *rozgars* Chunni Lal had 3½ *rozgars*, as also Lachman Das There were seven extra *rozgars*. . . . . Chunni Lal's sister was married to my maternal uncle's son. Her marriage took place in another house given by Lachchho. The money for expenses was received from Lachchho on the condition that the same would be deducted from Maya Ram and Deokaran's *rozgars*. . . . . There are two sorts of account books viz., (1) those relating to the business carried on by [the] proprietors alone, and (2) those relating to *rozgars*. . . . . Lachchho also had two sets of account books of the sort mentioned by me."

The extracts from the *roznamchas* (day-books) put in evidence by the respondent strongly corroborate this witness's evidence.

This mode of doing business necessitated the keeping of two sets of books, (1) daybooks containing the receipts and expenditure for each day, and (2) ledgers in which the principal and her agents were respectively debited and credited with the

proper sums in the separate accounts of each. Without these ledgers it is impossible to ascertain who ultimately bore the burden of any expenditure recorded in the day-books. As far as the books produced are concerned, there is, therefore, no proof whatever that the expenses of Chunni Lal's marriage were really borne by Lachchho. She herself says she advanced the money for the marriage and that it was disbursed. If the ledgers were produced, this matter would most probably have been cleared up. That ledgers existed is established by the admission of the respondent himself. In the year 1894, he instituted a suit in the joint names of himself and Lachchho against one Kunj Lal. On the 14th January 1895, a list of documents was produced with the plaint. It is signed by Radha Kishan as agent for Musammat Lachchho, and contains the following item :—

"Eight account books, *i.e.*, 5 day books and 3 ledgers from Sambat 1920 to Sambat 1950, relating to the plaintiff's business."

No ledgers whatever have been produced in these actions by the respondent, and only two day-books. The only witness who purports to account for their disappearance is Radha Kishan who verified this list. He deposes as follows :—

"The goods and property of the *kothi* (firm) are in Chunni Lal's possession. . . . . . My pay is Rs. 100 a year. I wrote the account books and performed the court business. I saw those account books also which were at the time prior to my entering the service. I did not see the account books of the time of Dwarka Das. I have seen the account books from sambat 1929. I might have seen some account books of the time prior to this also. I saw them in the *kothi* The *haveli* house is called *kothi*.

His examination was continued on the following day, when he again returned to this subject and deposed :—

"The account books, in reference to one of which I made my statement yesterday, were in existence. They were in that very house in which Chunni Lal lived. Now I hear that they are missing. Perhaps they might be locked up. . . . . . The account books were filed in connection with the case of Kunj Lal. I do not recollect the period for which the account books were filed. They were subsequently taken back from the court and had been kept in the *kothi*."

The only rational conclusion which can be drawn from this testimony is that evidence of a most important character has been deliberately suppressed by the respondent. That fact, coupled with his non-production as a witness, covers his case with suspicion. The account books which have been produced,

1908

KISHORI LAL v. CHUNNI LAL.

however, cover the period of his alleged adoption in the year 1877. It must, if it took place, have attracted the attention of almost every inhabitant of the small village of Thulai, and involved considerable expense. The accounts put in evidence on both sides are most detailed in character. Petty items of expenditure down to a fraction of a rupee are duly recorded under many heads. Having regard to the well-known habits of the people of India, as well as to the mode in which the business of this firm was carried on, it is inconceivable that, if this ceremony of adoption ever in fact took place, an account would not have been kept of expenditure incurred in respect of it. Yet there is only one item (a disputed one) of Rs. 5 in the accounts produced in which the word "adoption" is mentioned. It occurs in the middle of the items relating to the marriage of Chunni Lal in the year 1878, and, in their Lordships' opinion, plainly refers to this latter event. Many witnesses have been examined on both sides. They are of somewhat the same class and character—zamindars, money-lenders, persons accused of serious crime though not convicted, inhabitants of the village of Thulai and the adjacent villages; numbers of them of the same brotherhood, some of the same *gotra* as the respondent, many mere cultivators. They flatly contradict each other on almost every important point. Several of the respondent's witnesses not only prove that Dwarka Das before his end gave permission to his wives to adopt a son and gave directions to build a temple to his memory; but, with a vividness of recollection which is almost supernatural, purport to repeat the very words used by him for that purpose more than half a century before they themselves spoke. Others, again, purport to describe the most minute details of the ceremony of adoption, and to repeat the very words used by Maya Ram when he gave over his son, then 9 or 10 years old, to Lachchho and placed him on her lap, though that event must have occurred close on 25 years before the evidence was given.

In addition, many of the respondent's witnesses depose that, on the occasion of the dedication of the temple built by Lachchho near a place called Soron to the idol Dwarka Dhish, certain religious ceremonies were performed by Chunni Lal, because he was the adopted son of Dwarka Das, while almost as many

witnesses examined on behalf of the appellant—including the priest of the temple, Gopi Nath, who was present both at the ceremony of *pratishtha* (the placing of the idol in the temple for the *first* time) performed in 1883, and the *khamb ceremony* performed in 1893—proved that both of these ceremonies were performed by Lachchho herself, because Chunni Lal was not the adopted son of Dwarka Das, and that invitations to these ceremonies (two of which were produced) were sent out in the name of Dwarka Das, not in the name of his son, as they would have been had he been adopted. The inhabitants of Thulai examined on the appellant's behalf denied that such a remarkable ceremony as that of the adoption described ever took place in their village, while the members of the brotherhood and others examined on the respective sides proved that Chunni Lal passed and was known amongst his brotherhood and neighbours as the adopted son of Dwarka Das, or the son of Maya Ram, his natural father, and not the adopted son of Dwarka Das, according as they were examined for the respondent or appellant. It is impossible to reconcile these conflicting statements on any theory of the defective memory, or failing powers of observation, of the several witnesses who thus contradict each other. The only safe guide to follow in such a case is that afforded by the action and conduct of the principal parties concerned, and the contents of the documents produced. If Chunni Lal was adopted in the year 1877, as alleged, he became the absolute owner of the considerable property, movable and immovable, of which Dwarka Das died possessed, Musammat Lachchho being only entitled to her maintenance out of it; yet down to the time he began to quarrel with her (save in certain matters to be hereafter specially dealt with) not only did he never exercise the rights of an owner over the property, but he did not even assume the airs of ownership. He came to age, according to the Hindu Law, when he was 16, *i.e.*, about 1883, and according to the Indian Majority Act, 1875 (No. IX of 1875), about 1885. Yet, after he reached the age of manhood, he continued for years to act as paid agent over the estate—which, if he was adopted, was his own—at a salary the same in amount as his father received, namely, 3½ *rozgars*. Musammat

1908

KISHORI LAL v. CHUNNI LAL.

Lachchho has continued down to the present to be the registered owner of all the real property belonging to Dwarka Das in the *khewats* of the several villages in which that property is situated. Only once does Chunni Lal's name appear in any *khewat*, and then he is registered as the cultivator of a certain grove, and is described, not as the adopted son of Dwarka Das, but as the son of his natural father, Maya Ram. The income from these several villages was recovered and received by Musammat Lachchho in her own name, through the hands of her several agents, including the respondent.

It is not suggested that there was any agreement or arrangement that she should be permitted to remain registered as owner of these lands and act in all respects in that character. The respondent, in his written statement filed in the first action, says her name was "caused to be entered simply to console her." From a time, however, long prior to the adoption down to a recent date, she carried on this business of a money-lender. It may be fairly presumed that it was lucrative, else she would have abandoned it. Maya Ram, Deokaran, and Chunni Lal were her agents for that purpose. Yet, though several documents connected with this business were given in evidence, in none of them of an earlier date than the 15th July 1888 does the respondent's name appear, or is any mention whatever made of the adoption.

That, however, is not all. In corroboration of those of the appellant's witnesses who stated that Chunni Lal passed and was known among his brotherhood as the son of Maya Ram, his natural father, and not as the adopted son of Dwarka Das, a deposition made by him was put in evidence, from which it appeared that in a public court in December 1892 he deposed on oath that his name was Chunni Lal and his father's name Maya Ram. On the 7th January 1896 he signed a *vakalatnama*, executed in a pending suit, in which he described himself as son of Maya Ram. Again, on the 15th July 1898 he signed a similar document, drawn up and executed in a suit instituted by himself, which contains a similar description. A fourth document, possibly the most significant of all, was also given in evidence, namely, a list of biddings at a public auction held on the 21st

October 1895, at which he purchased some property for Rs. 1,200, in which he is described as "Chunni Lal, son of Maya Ram." It may be that the significance of these descriptions can, as was contended on his behalf, be explained away; but if so, the explanation should be given by the respondent himself upon oath, and he has abstained from giving it. As they stand, unexplained, they are inconsistent with his case, and support on this point the evidence given on behalf of the appellant.

It is, however, contended on the respondent's behalf that the several documents now about to be referred to discharge the burden of proof which rests upon him, and establish the fact of his adoption.

It is necessary to examine them in detail.

The first four are money-bonds executed in favour of Musammat Lachchho and Chunni Lal, who is described as the "adopted son," not of Dwarka Das, but of Lachchho. The consideration for two out of the four is a previous debt due to Lachchho alone. The first in date may be taken as a sample of the others. It is a hypothecation bond, dated the 16th June 1888, executed by Jamna and Lekha, two sons of Man Singh, deceased, for a sum of Rs. 800 due "to Musammat Lachchho, wife of Dwarka Das, and Chunni Lal, adopted son of Musammat Lachchho aforesaid." It is witnessed by Kadher Mal, one of the respondent's witnesses, who, in reference to it, deposed that it was written under Deokaran's supervision; that it was not read out to him; that he thought the bond was made in favour of Lachchho; and that the bond at the time of its registration was not read out by the sub-registrar to the executants, one of whom (Jamna) appears to be illiterate.

The fifth document is a petition dated the 8th June 1891, purporting to have been presented on Lachchho's behalf by her pleader Lokman Das, praying that "her adopted son, Chunni Lal," might be appointed her *sarbarahkar*. It is signed by Deokaran as her mukhtar on her behalf. Like the four preceding documents, it is altogether his work. Lokman Das, her pleader, was examined, and stated that Lachchho never came to him on any occasion, and there is nothing to show that the contents of any one of these documents were ever brought to her knowledge.

1908

KISHORI LAL v. CHUNNI LAL

In the month of February 1893, after the death of Deokaran, a suit was instituted in the name of Musammat Lachchho against one Gajadhar Singh to recover the amount of a promissory note, dated the 30th December 1889, executed in her favour by Gajadhar Singh and his father, Chet Ram. The pleaders for her in that case were Lokman Das and Jogindar Nath. The latter states that Chunni Lal gave him instructions and came to him to look after the case, and that Lachchho never came to him. The defendant in his written statement raised, on information and belief, the defence that the plaintiff could not recover, as she had adopted Chunni Lal, and that all the property of Dwarka Das, of which this note was part, vested in him. The statement or reply, if any, filed in answer is not in the record, but from the judgment of the Subordinate Judge of Aligarh it would appear that the defence put forward on Lachchho's behalf, presumably on Chunni Lal's instructions, was that she had adopted Chunni Lal as the son of her late husband, but that, notwithstanding this adoption, she had been and was in possession of the money-lending business inherited by her from her late husband, and the decision was to the effect that it was clear upon the evidence that the plaintiff was herself in possession of the money-lending business, and that, as owner in possession as well as the promisee of the note, she was entitled to sue. A good deal of suspicion attaches to these proceedings. They appear to disclose something like contrivance on Chunni Lal's part to get upon the record an admission of his adoption which would not affect the result of the proceedings. Had the suit failed, Lachchho would possibly have heard of the failure, but she would most probably know nothing of the averments contained in the pleadings. From first to last the efforts of Chunni Lal and his brother Deokaran seem to have been directed to bind Lachchho by descriptions of Chunni Lal as her adopted son, introduced into instruments upon the operation of which that description could have no effect whatever, and which would probably never be known to her.

The only other documents with which it is necessary to deal at length are (1) those connected with a suit which purported to be instituted on the 12th November 1894 in the names of

Musammat Lachchho and Chunni Lal, described as "adopted son of Dwarka Das," against one Kunji Lal and Duli Chand to recover possession of a shop in the market town of Hathras part of the estate of Dwarka Das, in which a compromise was entered into, and (2) those connected with a grant of land made to endow the temple erected by the widow to the memory of her husband, at Soron, because these are the only documents whose contents there is any evidence to show were brought to the knowledge of Musammat Lachchho. In the suit against Kunji Lal and Duli Chand, Lokman Das was again the pleader for the plaintiffs. He is not able to state whether he was instructed by Chunni Lal or some other agent of Lachchho's. The claim contains averments that:—

> "In his lifetime Dwarka Das was in proprietary possession and enjoyment of the said shop, and since his death Musammat Lachchho, plaintiff, has been in proprietary possession and enjoyment thereof for about 40 years and Chunni Lal, plaintiff, who is joint with her, has been in possession and enjoyment of it since the time of his adoption."

A compromise was arrived at to the effect that the plaintiffs should obtain a decree for possession, the defendants to obtain proprietary possession of the house on paying a lump sum of Rs. 1,500, with interest, within a certain time, and the costs of this and of a preceding suit instituted by the widow alone for rent not to be recovered.

This compromise was embodied in a memorandum entitled "Chunni Lal and Musammat Lachchho, plaintiffs, *v.* Kunji Lal and Duli Chand, defendants." It is signed by Chunni Lal, Duli Chand and Kunji Lal. It does not contain, in the body of it, any reference whatever to the fact of adoption, and except that the plural "plaintiffs" is once used in it instead of the singular "plaintiff," it might, as far as its language is concerned have been drawn up between Lachchho alone and the defendants. This memorandum was filed in Court, and a decree in the suit was on the 13th May 1895 made upon the basis of it. Before decree, however, one Ahmad Husain, an officer of the Munsif's Court at Hathras, went to the village of Thulai to get the compromise verified by Musammat Lachchho. He says that he read over and explained to her the contents of the memorandum, but on cross-examination he admitted that he did not remember

1903

KISHORI LAL v. CHUNNI LAL.

whether any "mention of the adoption was made." Unless he read out the title and emphasised the plural plaintiffs, there is nothing whatever in the document to suggest to Lachchho that she was not suing in this suit, as she had in the previous suit sued, for rent in her own name and in her own right. In this latter suit she was defeated, not on any non-joinder point, or because she was not owner, but solely for the reason that the agreement to pay rent for the shop had not been satisfactorily proved. Ahmad Husain states he drew and signed an attestation clause on this document—in which it is stated that Musammat Lachchho "heard and understood the contents" of the compromise—and duly attested the same. It purports to bear her mark. And the names of Kanhai Ram and Radha Kishan are signed as witnesses. Kanhai Ram was not examined. Radha Kishan swears that "the written statement" (presumably the compromise) was read over to her, and that she put her mark to it. He says nothing about her having understood it, or about its having been explained to her. On that evidence it is, in their Lordships' opinion, impossible to hold that Musammat Lachchho was fixed with the knowledge that Chunni Lal was joined with her in the suit as the adopted son of Dwarka Das, or that he was so described on the record.

The documents in the case on which the respondent most strongly relies are those connected with the endowment of the temple at Soron. They are three in number: (1) A tamliknama bearing date the 29th July 1899; (2) a special power of attorney dated the 8th August 1899; and (3) a special power of attorney dated the 10th August in the same year. They each purport to be executed by Musammat Lachchho and Chunni Lal who is described in each of them as the adopted son of Dwarka Das, and made a party to them in that character.

The tamliknama contains many long and complicated recitals, and amongst others the following:—

"According to the custom of my caste and the members of my brotherhood and under [illegible] adopted to him [illegible] after performin[illegible] the Hindu law. He (Chunni Lal) has now attained majority and he lives jointly with me and looks after all the affairs relating to the estate of

Dwarka Das. In accordance with the will of my husband, I, the Musammat, constructed at Soron, at the place where the Hindus perform worship, during the minority of the aforesaid Chunni Lal, a pacca stone building called Kunj at the cost of Rs. 50,000, under the supervision and management of Maya Ram, the natural father of the aforesaid Chunni Lal; and in Sambat 1940, I, after Chunni Lal, one of the executants, had attained majority, installed therein Thakur Dwarka Dhish Maharaj after performing the *pratishtha* ceremony according to the principle of the Hindu law."

The document then proceeds to declare, in its operative part, that the Thakur therein named shall remain in proprietary possession of the landed property therein described, in order to pay thereout his salary, and have the temple at Soron cleaned and kept in repair, &c. By the first power of attorney Radha Kishan is appointed attorney to procure a mutation of names in the registry in respect of this property so dedicated, and the second power of attorney is to somewhat similar effect. Musammat Lachchho in her evidence admits that she had built this temple, desired to endow it, and executed a deed for that purpose in favour of Thakurji, the deity named in it. She, however, positively denies that the deed was ever read over to her. She must have been about 60 years of age at that time, and she says her sight was dim. She admits that the registrar came to her house about the deed. She says that she sat behind the curtain, and he outside it; that he asked her if she had executed a deed in favour of Thakurji, and she replied yes: that he questioned her about the property she had given over to Thakurji, and she told him it was the property of Jahangirpur and Tor. She says that the deed was not read out to her by any of those present when she witnessed it, that she asked them to have it read out to her, and was told it would be read out afterwards. She further says that the registrar did not read it out, but merely told her it was a deed of gift to Thakurji. If this account be true, it is obvious that nothing occurred to call her attention to the statements in the deed concerning Chunni Lal's adoption, and in the face of her evidence it is incumbent on the respondent to establish conclusively that these particulars of the deed were brought to her notice before he can in any way rely upon them as admissions as against her. The deed was tendered for registration, and before its registration the sub-registrar in Hathras called upon her in

1908

KISHORI LAL v. CHUNNI LAL.

order to verify it. In his certificate he states that she "admitted the completion and execution of this document after hearing and understanding the same." He was examined as a witness. His evidence is rather extraordinary. He does not deny that she was inside the curtain and he outside, but he says that he read it over to her word for word; that his clerk also read it over to her; that he asked her if she understood the document word for word; that she replied, "I executed the document and I have understood it"; that she then added, "Chunni Lal is my adopted son"; that he said to her, what was the necessity of making mention of adoption therein, and that she replied, "I have made mention (of it) herein to make the matter more secure so that no dispute may arise in future." He admitted that he had not noted down that Lachchho had told him she had made the adoption. This witness proves rather too much. His clerk, who is alive, was not examined. His business would naturally be to find out if she knew that she was disposing of property by this deed, what was its nature and extent, and what was the purpose of the disposition. If the respondent's case be true, his adoption had been notorious for 22 years. Radha Kishan says that he also read the *vakalatnama* and power of attorney to Lachchho. Girdhari Lal, who was a witness to both this deed and the power of attorney of the 10th August, was not produced. Ram Prasad, whose name appears on the power of attorney of the 8th August, was called; he admitted that he drafted this document and said he read it over to Lachchho. He also states that both Lachchho and Chunni Lal said the latter was her adopted son, and then makes the extraordinary statement that it was suggested that the name of Musammat Lachchho should be expunged. According to this evidence the deed was read over to Lachchho three or four times, on as many separate occasions by as many different persons. Why this repetition? It is evident that Chunni Lal and his attorney, who is charged with the duty of superintending this litigation on his principal's behalf, and is therefore party to the suppression of evidence, arranged this entire business. Their Lordships are not satisfied that the passages of these documents dealing with the adoption of Chunni Lal were brought to the knowledge of Lachchho and their effect explained to her, though

the gift and declaration may have been. It was entirely collateral to the main purpose of the deed thus to record what, according to the respondent, was a notorious fact. Their Lordships cannot concur with the High Court that the fact that these or any other documents of the like kind containing such collateral recitals were registered and acted upon raises any presumption whatever that Lachchho was aware of the existence of the recitals in the instrument acted upon.

Of the many suspicious things about these documents containing references to adoption, or describing the respondent as an adopted son, one of the most suspicious is the absence of all reference to the date of the adoption. For all they disclose, it might have occurred at any time between his birth in 1865 or 1866, and July 1888. As far as appears in this case, the date of that ceremony was first fixed when the plaint in the second suit was filed on the 24th December 1900. The first action (*i.e.*, that in which Kishori Lal was plaintiff) was instituted on the 22nd September 1899, over fifteen months previously. In this latter case, though Chunni Lal pleaded that he was adopted, he did not name any date for the ceremony. Having regard to all these facts—the contradictions between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; and, above and beyond all, the non-production of any account of the expenditure at the ceremony of adoption—their Lordships think that the most rational and just conclusion is this, that the respondent has failed to discharge the burden of proof of the adoption which undoubtedly lay upon him, that is, that his case is not proven.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed, the decrees of the High Court discharged with costs, and the decrees of the Subordinate Judge restored.

1908

KISHORI LAL *v.* CHUNNI LAL.

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Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed, the decrees of the High Court discharged with costs, and the decrees of the Subordinate Judge restored.

1908

KISHORI LAL v. CHUNNI LAL.

The respondent must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant:—*Pyke, Parrott & Co.*

Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

1908, *December 1.*

Before Mr. Justice Richards and Mr. Justice Griffin.

BIBA JAN (PLAINTIFF) *v.* KALB HUSAIN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Sunnis—Waqf—Provision for celebration of anniversary of birth of Ali Murtaza, expenses of the Muharram and the death anniversaries of members of the family of the wâqif, also for repairs of imambara—Waqf held to be valid.

A Muhammadan lady belonging to the *Sunni* sect purported to make a waqf of all her property and provided that a sum amounting to decidedly the larger portion of the income of the dedicated property should be applied annually towards the following purposes, *viz.*, the celebration of the birth of Ali Murtaza, the expenses of keeping *tazias* in the month of Muharram, the anniversaries of the deaths of members of the wâqif's family and the expenses for repairs of an imambara which the wâqif had built, and declared that the property had been dedicated to God and charitable and religious purposes.

Held that the dedication was not illusory; there was an intention of creating a substantial waqf for pious and charitable purposes, and the objects for which the waqf was created were valid.

THE facts of the case were as follows:—

The plaintiff alleged that one Musammat Najiban was the daughter of plaintiff's father's sister, and was the owner of considerable movable and immovable property; that she died on the 4th of June 1904, when she was about 90 years old; that Kalb Husain, defendant No. 1, was the *mukhtar-i-am* and servant of Musammat Najiban; that Ata-ullah, defendant No. 2, also lived with the said Musammat at Bareilly, being the brother of the defendant No. 1; that Musammat Maddo Jan, plaintiff's own sister, who was defendant No. 3 in the suit, also lived with the said Musammat Najiban, who on account of her old age and having no child or near heir was under the undue influence of all these defendants; that the plaintiff was living in her husbands'

* First Appeal No. 52 of 1907, from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 17th of November 1906.

house in the Budaun district; that on the death of Musammat Najiban the plaintiff and her sister, defendant No. 3, became entitled to all the property left by the said Musammat in equal shares; that when the plaintiff made efforts to take possession of the property and to obtain mutation of names in her favour in the Revenue Court, she found that the name of the defendant No. 1 had been entered in the revenue papers in respect of a five biswa zamindari share in mauza Gurgawan under a deed of sale, dated 18th February 1902; that the names of defendants Nos. 1 and 2 were so entered in respect of another five biswa share in the said mauza under a waqfnama, dated the 2nd of November 1902, and that the names of all these defendants were entered in respect of the remaining property under a deed of gift, dated 26th February 1903; that the plaintiff desired to bring a separate suit in respect of the deeds of sale and gift, the present suit being only for possession and mesne profits in respect of the plaintiff's share in five out of ten biswas of mahals *mushtaqil* and *ihtimali* in the said mauza Gurgawan and a house named imambara in Bareilly, which were in the possession of the defendants Nos. 1 and 2 as mutawallis under the said waqfnama and for a declaration that the waqfnama was altogether invalid in law.

The defendants Nos. 1 and 2 contested the suit on the allegations that the plaintiff was not the daughter of Sana-ullah, Musammat Najiban's maternal uncle, and had no right to bring the suit; that the defendants were the sons of the said Sana-ullah, and one Musammat Mammi Jan, being the daughter of the said Sana-ullah, was a necessary party to the suit; that the deed of endowment was valid according to Muhammadan law, and had been executed by Musammat Najiban of her own free will and without any undue influence of any person and while she was in full possession of her senses and in proper health; and the wâqif had relinquished her own possession of the endowed property and had properly put the mutawallis in possession thereof; that the greater part of the income of the endowed property had been assigned for pious and charitable purposes, and a margin of the profits had been left to meet probable contingencies like those of alluvion, diluvion, costs of litigation and arrears, &c., and that if th endowment be held invalid and the plaintiff be proved to be a

1908

BIBA JAN v. KALB HUSAIN.

daughter of Sana-ullah, she could only claim one out of seven shares of Musammat Najiban's property and that the mesne profits claimed were excessive.

The Court below found that the plaintiff was one of the two daughters of Sana-ullah; that the defendants Nos. 1 and 2 were not sons of Sana-ullah, although they styled themselves as such, being the sons of one Musammat Dhuman a prostitute, who had never been married to Sana-ullah, although living with him; that Mammi Jan was not a necessary party, being the daughter of the said Musammat Dhuman; that the donor had built the imambara house in which she used to hold *majlises* (religious meetings) during *ashra* (the first ten days) of *muharram*, and being of a charitable and religious turn of mind, used to spend Rs. 1,000 to Rs. 1,200 per annum in these *majlises* and charities, and that the waqfnama had been validly executed by her and was consistent with her religious and charitable ideas; that the deed of endowment was not in favour of the defendants Nos. 1 and 2 except in so far as it made them the Mutawallis, and that the waqf in the present case was a valid waqf under the Muhammadan law. It accordingly dismissed the suit with costs. The plaintiff appealed.

Mr. *Abdul Majid*, for the appellant, submitted that the *Fatawa Alamgiri* was the most authoritative book for Sunni Muhammadans. According to it appropriations for reciting the Quran were void. Observance of *taziadari* ceremonies during the muharram were not in accordance with Sunni tenets. There must be *qurbat* (or nearness) between the appropriation and the object. If a Sunni Muhammadan were to make a waqf for *taziadari* ceremonies, there would be total absence of *qurbat*. He cited Baillie's Digest of Muhammadan Law, pp. 558, 569, 575.

It might be good to hold prayer meetings on the anniversary of a death, but it was not the general practice to observe ceremonies on the anniversary of a birth. The law was that the bulk of the property must go for charitable purposes. If this was not so, the whole waqf was void. The gist of the evidence was that during muharram illuminations took place and some sweets were distributed. These were not the sort of acts which

were meritorious and for which a valid waqf could be made according to Sunni laws. The *fatehah brasi* referred to in the deed could not mean the celebration of the death anniversaries of persons of the family. This was never countenanced by Sunni law. The establishment of an imambara is not a valid object among Sunni Muhammadans. Any sum appropriated for the purposes of the imambara would not go for any valid object, and except for the Imambara no certain object of appropriation was mentioned in the deed. The waqfnama was certainly invalid so far as this was concerned and it was therefore invalid as a whole. Regarding *fatehas*, illuminations and object of waqfs, counsel submitted the following original texts for consideration of the Court:—

(1) "It is reported by Abdullah, son of Masud, that the Prophet of God, may the mercy and peace of God be upon him, has said,—He who beats the cheeks and tears the garments and laments *lamentations of the days of dark,* is not among us (*i. e* among my followers)."

"It is reported by Burdah that Abu Musa became unconscious. Then his wife, Umma Abdullah, came and cried out weeping. When he came to his senses, he said, Do you not know (he mentioned the tradition saying) that the Prophet of God, may the mercy and peace of God be upon him, said 'I am angry with the person who gets his head shaved, weeps loudly, and tears his garments.' *These traditions are reported by Bokhari and Muslim.*"

[The Mishkatul Masabih, chapter relating to lamentation on the dead, sub chapter I, p. 150]

(2). "Among the objectionable inventions is the act done in most of the towns, *i. e.* the display of large number of lights by waste of money on certain nights of the year."

[The *Al-ukudu Duirrat-o fi-tankihil-Fatawat Hamidiyat-i. p.* 359.]

(3). "The Prophet of God, may the mercy and peace of God be upon him, has forbidden the recital of elegies."

[The book of the traditions reported by Ibn-i-Maja, the chapter relating to dead bodies, p. 115.]

So far as *fateha* was concerned there might be some difference of opinion among the authorities. It might be meritorious to some extent. But so far as *taziadari* was concerned there was no authority which considered it meritorious according to Sunni Muhammadans. The case of *Kaldoola* v. *Nuseeruddeen* (1) showed what purposes could be meritorious and what *waqfs*

(1) (1894) I. L. R., 18 Mad., 201.

A consideration of this question would render it necessary for their Lordships to inquire into the total income and expenditure of the endowed property in order to ascertain whether the appropriation made in the deed was for valid purposes or not. According to the plaintiff out of a total income of Rs. 2,500 after all appropriations and expenses there was a balance of Rs. 1,500 unprovided for in the deed, and this was clearly to go into the pockets of the mutawallis.

Mr. *Abdul Raoof* (Mr. *B. E. O'Conor* with him), for the respondents. The validity of the waqf was attacked on the ground that the objects for which it had been made were not countenanced by Sunni law and that the persons for the benefit of whose souls the endowment had been made were not regarded as sacred by the Sunni Muhammadans. Hazrat Ali was respected by Sunnis as well as Shias. The other three Caliphs his predecessors were revered by the Sunnis only. To say that any ceremony for the commemoration of Hazrat Ali was illegal would be contrary to Sunni tenets. The essence of the muharram ceremonies was that the Musalmans mourned the sad death of the two Imams Hasan and Husain. They were the grandsons of the Prophet and the sons of Hazrat Ali, whom the Shias and Sunnis would alike revere. The real [illegible] of *taziadari* (muharram ceremonies) was to assemble to [illegible]n for the sad death of the two Imams. The merits of the [illegible]onies were not to be judged by any artificial ceremonials [illegible] perhaps had gathered round the true object. The people [illegible] assembled there would observe a *manner of mourning and* [illegible]ould never make the waqf illegal because the idea of the waqf was to commemorate the death of the two Imams. The original authorities cited on behalf of the appellant had no bearing on this point. In reply to that the respondents submitted various authorities in the original. *Fatehas* are offered for the benefit of the souls of the deceased as the Roman Catholics celebrated their mass. The merits from them would also accrue to the good of those who offered them. It was to be observed also that during all these ceremonies substantial gifts were distributed to the poor and to all those who assembled in the *majlises*.

might be valid. As in that case, so in this, the waqf contravened the rule against perpetuities. Unless it could be shown that all the objects of taziadari were valid, the waqf wholly failed relating to objects of taziadari were valid, the waqf wholly failed the waqf was a of *Syed Mustafa* v. *Amina Begam* (1) was a case There was a d. waqf made by a Shia Muhammadan. Even then to the definition of w. declared invalid.

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So far as the *muallad sharif*, the celebration of the birth ceremony of the Prophet was concerned, it was in that the every pious Musalman. But the basal differenc for Sunni Sunnis and Shias lay where we came to the position citing the Caliph. On the whole, according to Shias, the endowment during be for pious purposes, which according to the Sunni tenets. for charitable objects.

It was also to be seen that the waqf was not certain ...ration the objects referred to in it—*Fatma Bibi* v. *The A*... take a *General of Bombay* (3). If their Lordships were of opinion of any of the purposes of waqf mentioned in the deed was ill... the question would remain whether the bulk of the property had been dedicated for charitable purposes or not, or whether it was a perpetual bequest to the *mutawallis* in the guise of a waqf. The following cases were referred to:—*Phulchand* v. *Akbar Yar Khan* (4), *Muhammad Ahsanulla* v. *Amarchand* (5) and *Abul Fahta* v. *Rasamaya* (6).

(1) (1904) 2 A. L. J. R., 519.
(2) (1896) I. L. R., 19 All. 211.
(3) (1881) I. L. R., 6 Bom., 42.
(4) (1896) I. L. R., 19 All., 211.
(5) (1889) I. L. R., 17 Calc., 498.
(6) (1894) I. L. R., 22 Calc., 619.

restricting the accountability of the mutawallis were certainly void, but so was not the waqf. Here the question could not arise whether the whole was a scheme in disguise for the benefit of the mutawallis. The donor herself calculated the income of the endowed property to be Rs. 1,000. The position of the Mutawallis in respect of expenditure from this income was more like that of an executor of will. The mere fact that there could be a possible surplus left with the mutawallis would not invalidate the waqf. The whole corpus and so the whole income, together with any possible increase or diminution, was the subject-matter of the waqf. The case of *Muhammad Munawar Ali* v. *Rasulan* (1) related to the waqf of a Sunni. At page 336 the clauses of the waqf are discussed. There a substantial portion of the property had not been dedicated for charitable purposes. Here the entire property had been so dedicated.

The case of *Luchmiput* v. *Amir Alum* (2), would show how far *fatehahs, &c.*, were good purposes for waqf. The word *Urs* as defined in Hughes' *Dictionary of Islam*, showed that they were ceremonies for the celebration of any celebrated saint of Islam.

Only a small portion of the income had not been shown as specifically appropriated to any of the specific objects mentioned in the deed. That was because the up-keep of the estate was expensive. Portions of the mahals were subject to heavy litigation ... to alluvion and diluvion. The extra expenses for all these mourn... The respondents submitted that no portion of the ceremonies ...eant for their personal benefit. The respondents that perhaps *Phul Chand* v. *Akbar Yar Khan* (3), *Sayed Mustafa* who assemb... The original authorities submitted will show it could nev... waqf could not be set aside simply because an insig- waqf was to ... could be said to be unauthorized. The waqf was original au...r on the ground that it was illusory or upon the ground bearing ... objects were *not authorized* by Muhammadan law.

Mr. *A*... *Majid*, replied.

R... ...d GRIFFIN, J.J.—The plaintiff in this suit seeks to s... ...*ma*, dated the 2nd of November, 1902, executed b... ...t Najiban, and for possession of a half share i... ...th by the waqfnama, and for mesne profits.

...31 All., 329. (3) (1896) I. L. R., 19 All., 211.
...Calc., 178. (4) (1904) A. L. J. R., 519.

1908

BIBA JAN v. KALB HUSAIN.

It had been argued before their Lordships that portion of the appropriation was bad because the object had not been mentioned with certainty. The words *Fatehah barsi* etc., could not mean *Fatehahs* for the benefit of all dead souls. A reasonable construction was to be put on such language conveying the wâqif's intentions. The language could only mean that the dead persons of the donor's own family were referred to. Ameer Ali *Muhammadan Law*, Vol. 1, 3rd ed. 174.

There was no uncertainty in the subject-matter, neither in the object. The motive was for the good of the poor (*Ibid.* page 323). Even mere vagueness, if there was any, could not invalidate the whole waqf. The law would hold it valid for all the valid purposes enumerated in the deed. Something like the doctrine of *cy-pres* it was submitted, would apply. The case of *Kaleloola* v. *Naseeruddeen* (1) would support the respondents' case better than it would the appellant's. At page 213 it was mentioned that a waqf for *fatehahs* was valid when made for the benefit of the souls of the saints. Again at page 206 the practice, the appellant so strongly objected to, was reported to have been sanctified by long usage and custom. These specific pleas had not been raised in the Court below and so there was no discussion of such matters in the judgment. Had they been raised there would have been overwhelming evidence to [illegible] that the Sunnis as a matter of fact observe such ceremonies [illegible]

Upon a proper construction of the deed it wo[illegible] the entire income was to go for charitable purpose[illegible] herself regarded her entire ten biswas property to [illegible] income of Rs. 2,000 only: for she had leased the [illegible] share for that sum. The corpus of the 5 biswa [illegible] dedicated. The income, whatever it was, (the [illegible] regarded it at Rs. 1,000 per annum) was to be regarded [illegible] cated. No special provisions had been made for the bene[illegible] mutawalli who were always accountable for the property [illegible] public. It was only when a specific portion of the income [illegible] dedicated to charity, side by side with any provisions for the mutawallis that a question could arise whether a substantial dedication for public charity had been made. Any condition

(1) (1894) I. L. R., 18 Mad., 201.

restricting the accountability of the mutawallis were certainly void, but so was not the waqf. Here the question could not arise whether the whole was a scheme in disguise for the benefit of the mutawallis. The donor herself calculated the income of the endowed property to be Rs. 1,000. The position of the Mutawallis in respect of expenditure from this income was more like that of an executor of will. The mere fact that there could be a possible surplus left with the mutawallis would not invalidate the waqf. The whole corpus and so the whole income, together with any possible increase or diminution, was the subject matter of the waqf. The case of *Muhammad Munawar Ali* v. *Rasulan* (1) related to the waqf of a Sunni. At page 336 the clauses of the waqf are discussed. There a substantial portion of the property had not been dedicated for charitable purposes. Here the entire property had been so dedicated.

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t[illegible] objects were not authorized by Muhammadan law.

Mr. *Abdul Majid*, replied.

RICHARDS and GRIFFIN, JJ.—The plaintiff in this suit seeks to set aside a *waqfnama*, dated the 2nd of November, 1902, executed by one Musammat Najiban, and for possession of a half share in property dealt with by the waqfnama, and for mesne profits.

(1) (1899) I. L. R., 21 All., 329.
(2) (1884) I. L. R., 9 Calc., 176.
(3) (1896) I. L. R., 19 All., 211.
(4) (1904) A. L. J. R., 612.

1908

BIBA JAN v. KALB HUSAIN.

The plaintiff alleged that the execution of the deed was brought about by the undue influence of Kalb Husain, that Najiban was insane when she executed the deed and that no valid endowment had been created (1) because the objects were not legal, and (2) because the endowment was illusory and really made for the benefit of Kalb Husain and his brother Ataullah, the mutawallis appointed by the waqfnama. This appeal is closely connected with First Appeal No. 341 of 1906 decided on the 27th November 1908, and also with another First Appeal No. 340 of 1906, which it has been unnecessary for us to decide inasmuch as the parties compromised it. The evidence in all these cases was by consent read as evidence in each case. The two connected appeals Nos. 340 and 341 of 1906 arose out of suits to set aside a deed of sale, executed by Musammat Najiban on the 18th of February, 1903, in favour of Kalb Husain on the grounds of the insanity of Musammat Najiban and the undue influence of Kalb Husain. The case of the plaintiff, so far as the plea of insanity was concerned, completely failed, and we have given our reasons at length in First Appeal No. 341 of 1906 for holding that the case founded on undue influence has also failed. The court below decided in favour of the plaintiff in the connected cases on the ground that the transaction came under the provisions of section 16 of the Contract Act. But the present suit was dismissed, the court below being clearly of opinion that Najiban was not insane and that undue influence was not proved. We agree with the court below in this finding and we do not think it necessary to discuss the evidence, particularly as we have already dealt with it in our judgment in First Appeal No. 341 of 1906.

There remains the question of the validity of the waqfnama. In the court below this was certainly not the main ground of attack on the waqfnama, but it was raised by the pleadings and has been argued by Mr. *Abdul Majid* in support of the appeal. Najiban, it is clear from the evidence, was piously and charitably disposed for a number of years before her death. She had built an Imambara at a cost of several thousand rupees. She was in the habit of keeping *tazias* and distributing gifts of food in charity. Her expenses in these acts

of charity amounted to Rs. 1,000 or Rs. 1,200 a year. She took a special interest in these matters. Before her death she made a pilgrimage to Mecca and after her return she continued the same pious course of action. All this clearly appears from the evidence. The endowed property, which of course includes the imambara, is stated in the waqfnama to be worth Rs. 40,000. The landed property exclusive of the imambara is worth Rs. 30,000. It appears that the tenants were some what unruly and there was considerable amount of litigation in realizing the rents. Part of the landed property consisted of a share in an alluvial mahal, the income of which was subject to fluctuation. The waqfnama is to the following effect:—

"Whereas there are a 5 biswa zamindari share in 10 biswa *patti surkh* in the village Gurgawan, pargana Aonla, and a *pacca* newly built house used as Imambara No. $\frac{15}{862}$, in Bareilly near the library, bounded as given below, worth Rs. 40,000, and I am up to this time in proprietary possession thereof without the participation of anyone, I have now in a sound state of body and mind without coercion and of my own accord made a *waqf* of the whole of the said property, *i.e.* 5 biswas of the village Gurgawan and the house used as imambara together with all the original and appended rights, zamindari appurtenances, *sir* land, groves, collection houses, *abadi*, *bazar* (market), all the *sewai* items and *muafis*, etc., including *mahruka* lands, for religious and charitable purposes subject to the following conditions and have appointed Kalb Husain, general attorney, and Ataullah, sons of Shaikh Sanaullah, as *mutawallis* (superintendents) of the endowed property and put the said *mutawallis* in possession thereof like myself. I shall get mutation of names in respect of the said zamindari share duly effected in the revenue department (Court).

1. The said *mutawallis* should collect rent and every sum of money due in respect of the endowed property, and pay the Government revenue, the village expenses and the salaries of the servants and out of the remaining amount of net profits they should pay under their own management Rs. 200 annually for the expenses of *milad* (birth anniversary) of the last of the Prophets (may the mercy of God be upon him) and that of Ali Murtaza in the months of Rabi-ul-awwal and Ramzan respectively, Rs. 600 for the expenses of making offerings and keeping *tazias* in honour of the chief of the martyrs, namely, Imam Husain and Hasan (may peace be on them) in the month of Muharram, and Rs. 200 for the expenses of the death anniversary of the dead persons and the repairs of the *Imambara*.

2. The said *mutawallis shall, in no case, have power to sell or* mortgage the endowed property, nor shall the said property be liable to pay the debt due by the *mutawallis* or to be sold by auction.

1908

BIBA JAN v. KALB HUSAIN.

3. Should the said *mutawallis* die without appointing anyone as *mutawallis* or their representative, a qualified male descendant of the present *mutawallis* shall be appointed as *mutawalli*; no other person shall have a right to be appointed as *mutawalli*. On the other hand this order of succession shall remain in force for all eternity generation after generation. No committee or society can interfere in the endowed property, inasmuch as the profits of the said endowed property have been dedicated for the maintenance of charitable purposes and offerings so that my name may be perpetuated in this world as well as in the next world and my soul benefited in the next world.

4. All the proceedings in the civil, criminal and revenue courts and in the Honourable High Court, Board of Revenue, Privy Council and all the departments in India relating to the affairs of the endowed property shall rest with and be taken under the control of the *mutawallis*.

5. I have made the endowed property God's property from this day and divested myself of all proprietary connection therewith. After agreeing to the aforesaid conditions, I have executed this deed of endowment, in order that it may stand as authority and be of use when needed."

It will be noticed that the mutawallis are directed to collect the rents, then to pay the Government revenue, the village expenses and the salaries of the servants, and then to apply the net profits in certain proportions.

The actual amounts are set out. They come to a sum of Rs. 1,000. It is argued that the property must yield a net profit of more than Rs. 1,000 per annum and that as only Rs. 1,000 is appropriated, the balance would all come into the hands of the mutawallis, Kalb Husain and Ataullah, beneficially. As regards this it must be borne in mind that it is not only Rs. 1,000 which is appropriated by the donor to the service of God. She expressly says that the entire property is appropriated to the service of God. Mr. *Abdul Raoof* counsel on behalf of the respondents, repudiates all claim to any beneficial interest to any part of the income of the estate. If we assume for the purposes of this branch of the case that the objects of the waqf were legal and that the waqfnama was duly executed, the onus of showing that having regard to the value of the property, the waqf was merely illusory lay upon the plaintiff. We have been referred to the extract from the khewat of 1310 fasli, exhibit 15 C., in which the Government revenue of the entire 10 biswa share owned by Najiban is shown as Rs. 3,912 and to an extract from

the jamabandi, for 1310 Fasli showing the income of the 10 biswa share for that year. The patwari of the village was examined as one of the plaintiff's witnesses. He stated that the Government revenue was Rs. 4,537-14-7. That statement was allowed to go unchallenged and it was accepted by the court below. This witness further stated that the village expenses according to the account furnished to him by the agent amounted in 1312 fasli to Rs. 2,244-2-9. The village expenses and the expenses of the management seem no doubt very high, but we think it very probable that for many years the village had been managed in an extravagant way. Mu-ammat Najiban had been a prostitute and a dancing girl. It appears that the whole 10 biswa share had been leased out for a term of 14 years from 1878 to 1892 at a rent of Rs. 2,000 This would leave only Rs. 1,000 as the profits of the endowed property. This lease had expired in 1892 and the estate is now probably of greater value, but we do not think that there would be a very large surplus over and above Rs. 1,000 after defraying the pay of the servants and the cost of managing the estate. Under the waqfnama the mutawallis get no remuneration for their services and they would of course be justified in paying for the services of manager of the property. Taking all the evidence into consideration we are clearly of opinion that it can not be said that the main object of the waqfnama was to benefit the mutawallis under the guise of religious and charitable endowment. On the contrary there was a dedication of the entire property to the objects set out in the waqfnama.

The only point that remains is the question of the *validity* of the objects of the endowment. The parties are Sunnis and it is contended that to endow the property for the purpose of celebrating the *milad* of Ali Murtaza is not good according to Hanafi School, although it is admitted that a like celebration of the *milad* of the Prophet stands on quite a different footing and is valid. The appropriation of Rs. 600 to muharram is also challenged on like grounds. We have been referred to no authority forbidding the celebration of the birth of Ali Murtaza. As to the muharram expenses, the deed provides for the making of the offerings, *i.e.* feeding of the poor on the occasion of the muharram. This is clearly a charitable object, and the keeping of the tazias is a

20

1908

HIRA JAN *v.* KALB HUSAIN.

pious and religious ceremony not restricted solely to the Shia sect. It may be that the mode of observing the ceremony differs in the case of each sect, but we are satisfied that in the present case the intention of the donor was to continue and perpetuate the religious ceremonies and charitable works in which she had been engaged during her life. The remaining Rs. 200 is appropriated to the death anniversaries (*barsi ammat*) and to the repairs of the Imambara. The latter is admittedly a legitimate object of waqf. The contention of the respondents is that the death anniversaries (*barsi ammat*) should be understood as meaning the death anniversaries of the members of Najiban's family, and we think that this is a reasonable interpretation to be put on the words. We have come to the conclusion, after considering the evidence and the arguments, that the waqfnama was not illusory and there was an intention of creating a substantial waqf for pious and charitable purposes, and we hold that the objects for which the waqf was created were valid. We therefore dismiss this appeal with costs.

Appeal dismissed.

1908 December 14.

APPELLATE CRIMINAL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

EMPEROR *v.* GUTALI.*

Act No. XLV of 1860 (Indian Penal Code), section 302—Murder—Poisoning by dhatura—Intention—Knowledge.

Dhatura was administered with the usual object of facilitating robbery, but in such quantity that the person to whom it was given died in the course of a few hours.

Held that the person so administering dhatura was rightly convicted under section 302 of the Indian Penal Code.

THE facts of this case are fully stated in the judgment of the Court.

The Assistant Government Advocate, (Mr. *W. K. Porter*) for the Crown.

AIKMAN and KARAMAT HUSAIN, JJ.—The appellant Gutali alias Ajudhia, has been convicted of an offence punishable under section 302 of the Indian Penal Code and sentenced to transportation for life. He has also been convicted of an offence [illegible]

* Criminal Appeal No. [illegible] of 1908 [illegible] Sessions Judge of [illegible]

under section 328 of the Indian Penal Code and sentenced to 10 years' rigorous imprisonment. The sentences have been ordered to run concurrently. We have read through the whole of the evidence and we see no reason whatever to doubt the prisoner's guilt. On the 29th of May last he attached himself to an old man Arjun and his grandson Ram Nath, who had gone to Mahaban to purchase an ox. He was previously unknown to them. He said that he was a Thakur of Chilikpurwa and that he too had come to buy an ox. He remained in their company from 2 or 3 gharis after sunrise until after noon. Both Arjun and his grandson partook of the food which the accused had procured. The accused pressed them to go to the village Karahra where he said he had seen some bullocks for sale. After going a short distance Arjun became ill and fell to the ground unconscious. He and his grandson were seen lying on the road that same evening. The grandson was dead. Arjun and the grandson were seen by the Hospital Assistant, who found in each case the pupils of the eyes dilated. When Arjun was found, he was seen to be plucking at the ground with his hands. The brain of Ram Nath was congested and in the opinion of the Hospital Assistant the congestion was probably caused by poison. Although no poison was found by the Chemical Examiner in the portion of the viscera of Ram Nath sent to him, we think that there can be little doubt that *dhatura* had been administered. When Arjun came to himself, he found that he had been robbed of his money and his grandson's ear-rings had been taken away. The *dhotis* of both had also been taken away. At that time no trace was found of the person who had been in the company of Arjun and the deceased.

On the 19th of June two more men, Girdhari and Hallis, were joined by an utter stranger, who persuaded them to partake of food which he gave them. They both became unconscious. Before the accused could make off, some residents of Nathupura came up and had their suspicions aroused by what they saw. They arrested the accused as he was attempting to make off. He was taken to the police station and sent to the Hamirpur jail. There on the 1st of July he was picked out by Arjun from amongst a number of under trial prisoners as the man who had

1908

EMPEROR v. GUTALI.

been in his company for several hours on the 29th of May and had given him the food, after eating which he became unconscious and his grandson died. No reason is assigned to account for Arjun or the other witnesses falsely identifying the accused. The evidence of the Hospital Assistant and of the Chemical Examiner clearly proves that Girdhari and Hallia were drugged with *dhatura.* The prisoner called evidence to prove an *alibi* which we agree with the learned Judge in considering quite insufficient to shake the strong case for the prosecution. We see no reason to interfere with either conviction. Although death does not always follow from *dhatura* poisoning, yet it does follow in a considerable proportion of cases. Here the accused must have given *dhatura* to Ram Nath in such a large quantity as to result in his death within 3 or 4 hours. We consider therefore that although he may not have intended to kill Ram Nath, he must be held to have known that his act in giving a dangerous substance in such a quantity was at least likely to cause death. We find no reason for interference and dismiss the appeal. [But see *Emperor* v. *Bhagwan Din,* I. L. R., 30 All., 568 —Ed.]

Appeal dismissed.

1908 *December* 14.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

JHINGAI SINGH *v.* RAM PARTAP.*

Criminal Procedure Code, sections 145 and 435—Statute 24 and 25 Vict., Cap. CIV, section 15—Order under section 145, Criminal Procedure Code—Revision—Powers of High Court.

Where proceedings are in intention, in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly [illegible]

[illegible]

Govind (2) and *Baldeo Baksh Singh* v. *Raj Ballam Singh* (3) referred to. *Maharaj Tewari* v. *Har Charan Rai* (4) followed.

* Criminal Revision No. 725 of 1908, from an order of D. T. M. Wright, Magistrate 1st Class, of Mirzapur, dated the 24th July 1908.

(1) (1899) I. L. R., 26 Calc., 625.
(2) (1900) I. L. R., 24 Bom., 527.
(3) (1903) 2 A. L. J. R., 274.
(4) (1903) I. L. R., 26 All., 144.

ON the 7th of August 1901, one Mahadeo Singh executed a usufructuary mortgage of certain property belonging to him in favour of Jhingai Singh whereby he mortgaged his interest as *Malik Adna* in the holding. One Makhan Tiwari claimed to be the occupancy tenant of the same holding, and Ram Partab alleged himself to be the sub-tenant of Makhan. In a litigation between Makhan Tiwari and Jhingai Singh before the Subordinate Judge of Mirzapur, a compromise was filed on May 24th, 1905, whereby, subject to certain terms, Makhan Tiwari agreed to surrender possession of the holding to Jhingai Singh. Jhingai Singh obtained possession and executed a *dakhalnama* on the 28th of June 1905, in pursuance of the compromise decree. Subsequent to this Makhan Singh, on the 2nd of July 1905, executed a lease of the holding in favour of Ram Partap. Ram Partap filed a complaint under section 145 of the Code of Criminal Procedure in the court of the Magistrate of Mirzapur against Jhingai Singh. The Magistrate held that Ram Pratap was in actual possession. He did not refer to the proceedings in the Civil Court. Jhingai Singh made an application for revision to the High Court.

Babu *Durga Charan Banerji*, for the applicant, contended that a Magistrate was not justified in disregarding the decree of the Civil Court. It was his duty to uphold and carry out that decree so far as it lay in his power to do so. To take proceedings which necessarily must have the effect of cancelling such decree, was to assume a jurisdiction which the law did not contemplate. The Magistrate having acted without jurisdiction in going behind the judgment of the Civil Court, the High Court had power to interfere. He relied on *Daulat Koer* v. *Rameswari Koeri* (1), *Baldeo Baksh Singh* v. *Raj Ballam Singh* (2) and *In re Pandurang Govind* (3).

Dr. *Tej Bahadur Sapru*, for the opposite party, submitted that where an order under section 145 of the Code of Criminal Procedure existed and the proceedings were in substantial compliance with the requirements of the section, the High Court had no power in revision to interfere. He referred to the proceedings drawn up under section 145, Criminal Procedure Code, and cited

(1) (1899) I. L. R., 26 Calc., 625. (2) (1903) 2 A. L. J., 274.
(3) (1900) I. L. R., 24 Bom., 527.

1908

JHINGAI SINGH v. RAM PARTAP.

Baban Singh v. *Baldeo Singh* (1), *Debi Prasad* v. *Sheodat Rai* (2), *Behari Lal* v. *Chajju* (3) and *Maharaj Tewari* v. *Har Charan Rai* (4).

KNOX, J.—This is an application in revision asking this Court to call for the record and to revise an order passed under section 145 of the Code of Criminal Procedure on the ground that the magistrate who passed the order complained of refused to uphold an order passed by the Civil Court and decided the question before him contrary to that order. I have considered the following cases referred to by the learned advocate for the applicant:—*Daulat Koer* v. *Rameswari Koeri* (5), *In re Pandurang Govind* (6) and *Baldeo Baksh Singh* v. *Raj Ballam Singh* (7) decided by this Court on 11th December 1903. But it has already been held by a Bench of the Court in *Maharaj Tewari* v. *Har Charan Rai* (8) that as the law at present stands where the proceedings below are in intention, in form and in fact proceedings under chapter XII of the Code of Criminal Procedure by a magistrate duly empowered to act under that chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861. It has not been shown to me that the proceedings before the learned magistrate were not proceedings under chapter XII of the Code or that he was not duly empowered to act under that chapter. According to the contention of the learned advocate it was after being properly seised of the case that the learned magistrate went out of his way, passed an order which he had no jurisdiction to pass, and that by it the learned advocate's client has been debarred from all remedy and deprived of the fruits of the case won by him in the Civil Court. This may or may not be so. The fact remains that section 435 expressly excepts records of proceedings under chapter XII, and I know of no other Act or Statute which confers upon this Court the power of sending for such proceedings. The application is dismissed.

Application dismissed.

(1) Weekly Notes, 1907, p. 60.
(2) Weekly Notes, 1907, p. 265
(3) Weekly Notes, 1907, p. 43.
(4) (1903) I. L. R., 26 All., 144.
(5) (1899) I. L. R., 26 Calc., 625.
(6) (1900) I. L. R., 24 Bom., 527.
(7) (1903) 2 A. L. J. R., 274.
(8) (1903) I. L. R., 26 All., 144.

Before Mr. Justice Richards and Mr. Justice Griffin.

1908
December 16.

KISHAN KUNWAR (PLAINTIFF) *v.* GANGA PRASAD (DEFENDANT).*

Civil Procedure Code, (1882), section 202—Procedure—Court not competent to alter judgment after delivery.

Where a District Judge wrote and delivered a judgment in a civil appeal, but suspended the issue of his decree pending the production by the plaintiff of a certificate of succession, it was *held* that it was not competent to the Judge to cancel the judgment already delivered and to pronounce a second judgment inconsistent therewith.

THE facts out of which this appeal arose are as follows:—

The defendant No. 1 executed a mortgage in favour of Makhan Lal, husband of the plaintiff, on 18th January 1901. Makhan Lal died leaving plaintiff as sole heir and representative. She brought this suit for sale on foot of the mortgage of the 18th of January 1901. The defendant No. 2 held a prior usufructuary mortgage as well as a subsequent mortgage over the same property. He pleaded that two sisters of the mortgagor were also owners of the mortgaged property and were necessary parties to the suit and that the plaintiff, being a mortgagee of the interest of defendant No. 1 alone, could not redeem his mortgage and bring the property to sale. In the court of first instance, the defendant No. 2 prayed for an adjournment, which was refused and the plaintiff's suit was decreed. On appeal to the District Judge, he, on the 20th May 1908, delivered a judgment holding that there was no cause shown for an adjournment, and also deciding the other points against the defendant No. 2, but adding:—"I defer passing a decree in this appeal for two months in order to give plaintiff an opportunity of producing a succession certificate." On the 25th May 1908, however, the District Judge passed an order remanding the case to the court of first instance on the ground that as the defendant No. 2's prayer for an adjournment had not been granted, he had not had a sufficient opportunity of presenting his case. The plaintiff appealed.

The Hon'ble Pandit *Sundar Lal*, for the appellant, contended that the court below had no jurisdiction to go behind the judgment recorded by it on the 20th May 1908. Section 202 of the Code of Civil Procedure forbade the alteration of a judgment.

* First Appeal No. 83 of 1908, from an order of H. J. Bell, District Judge of Aligarh, dated the 25th of May 1908.

1908

KISHAN KUNWAR v. GANGA PRASAD.

The Judge had simply deferred passing the decree, until a succession certificate was produced. He had no power to re-open the matter and deliver an altogether fresh judgment.

Dr. *Satish Chandra Banerji* (with him Babu *Benoy K. Mukerji*), for the respondent, submitted that the case was not finally disposed of on the 20th May 1908. It was still on the list of pending cases. No decree was framed on the basis of the writing dated the 20th May 1908. It was therefore not a 'judgment' within the meaning of the definition in section 2 of the Code.

The only judgment in the case was that dated the 25th May 1908. So long as a case was pending in a court, the court had seisin of it, and if it found that an opinion expressed by it at a former stage was erroneous, it could give effect to its reconsidered opinion when disposing of the case finally. Here the Judge himself stated that all the facts were not fully present before his mind on May 20th.

After an appellate court has expressed an opinion and remitted issues to the lower court, which records findings on those issues, the appellate court can re-open the case and decide it without reference to those findings. He referred to *Lachman Prasad* v. *Jamna Prasad* (1) and *Amir Kazim* v. *Zainab Begam* (2).

RICHARDS and GRIFFIN, JJ.—This was a suit on foot of a mortgage. The plaintiff's mortgage was dated the 18th of January 1901. Defendant No. 1 was the executant of the mortgage. Defendant No. 2 held a prior mortgage from the same mortgagor. He also held a second mortgage from the same mortgagor and also alleged that he held a third mortgage from him. The court of first instance decreed the suit. Defendant No. 2 alone appealed. His grounds of appeal to the lower appellate court were that he had not had sufficient opportunity to present his case, and that he had applied to the court of first instance to adjourn the case, which that court refused to do. The matter having come up for trial to the lower appellate court, judgment was delivered on the 20th of May 1908. The court in the clearest possible way decided that defendant No. 2 had had sufficient opportunity in the court below. The judgment goes into the entire facts of the case. It deals with all

(1) (1887) I. L. R., 10 All., 162. (2) Weekly Notes, 1897, p. 164.

the objections of defendant No. 2. It was, however, necessary for the plaintiff before a decree could be passed in her favour that she should produce a certificate to collect debts as the heir of the original mortgagee. The concluding words of the judgment are—"following the course adopted by the High Court in *Abdul Karim Khan* v. *Maqbul-un-nissa* (1), I defer passing decree in this appeal for two months in order to give the plaintiff an opportunity of producing the certificate" This judgment is duly signed and dated, and it is impossible to read it without seeing that the Judge intended it to be a complete judgment. He merely deferred passing the decree for production of a certificate to collect debts. He did not even adjourn the case. Five days afterwards the court delivered a second judgment and made an order remanding the case to the court of first instance.

This judgment is inconsistent with the first judgment. According to the first judgment nothing remained to be done except to pass a decree. According to the second judgment the learned District Judge was to pass no decree at all but remanded the case to the court of first instance. Section 202 of the Code of Civil Procedure provides that as soon as a judgment is dated and signed by the Judge in open court it must not be altered or added to, save to correct verbal error or to supply some accidental defect not affecting a material part of the case, or on review. In view of these provisions of the Code, we think that the order of the Court below was illegal. We accordingly allow the appeal, set side the order of the court below, and remand the case, directing the learned District Judge to deal with the case in accordance with his judgment of the 20th May 1903. The appellant will have his costs.

Appeal decreed.

(1) (1903) I. L. R., 30 All., 315.

APPELLATE CIVIL.

1908
December 22.

Before Mr. Justice Richards and Mr. Justice Griffin.

GANGA DAYAL (PLAINTIFF) *v.* MANI RAM AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), section 8—Joint Hindu family—Sale of joint property by guardian of minors—Suit to avoid sale—Limitation.

The certificated guardian of two Hindu minors sold certain property of the minors without the sanction of the District Judge. Within three years of his attaining majority the younger of two minors, who were brothers, sued to avoid the sale. The elder, however, had come of age several years earlier and had taken no steps to repudiate the transaction. *Held* that the suit was not barred by limitation. *Periasami* v. *Krishna Ayyan* (1) and *Vigneswara* v. *Bapayya* (2) referred to.

One Baji Lal died on 19th August 1884 leaving the plaintiffs as his heirs. Musammat Parbati was in February 1886, appointed guardian of the person and property of the plaintiffs, who were minors. She made an application to the court for leave to sell a 5 anna 4 pie share in village Grantha and a 7 anna 4 pie share in village Amritpur. The District Judge sanctioned the sale on the terms that defendant No. 1 Mani Ram should give a clear receipt of all that was due to him and the consideration for the sale was to be Rs. 8,400. Instead of carrying out this sale, a sale of a totally different nature was made on 28th April 1886. The property sold was not the same property which the Judge had given permission to sell, and instead of the minors' getting a clear receipt for all the debts due to Mani Ram, the sum of Rs. 1,000 only was placed to their credit. Mani Ram and defendants Nos. 2 and 3 had also a mortgage on part of the property, which they foreclosed, although it was the intention of the sale which the Judge had permitted that the mortgage should be extinguished as far as the minors and their property were concerned. The plaintiffs brought this suit for cancellation of the sale-deed and possession of the property. Plaintiff No. 1 attained majority according to the finding of court below more than 15 years before the institution of the present suit. The suit however was brought within 3 years of plaintiff No. 2 attaining his majority. The first court

* Second Appeal No. 1354 of 1907, from a decree of W. Tudball, District Judge of Cawnpore, dated the 2nd of September 1907, reversing a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 7th of January 1907.

(1) (1902) I. L. R., 25 Mad., 431. (2) (1893) I. L. R., 16 Mad., 436.

(Subordinate Judge of Cawnpore) decreed the suit, but the lower appellate court (District Judge) reversed the decree.

Plaintiff No. 2 appealed.

Mr. *Nehal Chand* (with him Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal*), for the appellant, submitted that the sale by the certificated guardian was void and the minors could ignore the sale.

Act VIII of 1890 was not in force when the present sale took place. The Act in force was Act XV of 1850, which contained no provision similar to that contained in section 30 of the present Act. Section 2 of the present Act had no restropective effect. *Lala Hurro Prosad* v. *Basaruth Ali* (1).

Section 8 of the Limitation Act had no application. This was a joint Hindu family. One brother could not give a valid discharge without the concurrence of the other. The Act contemplated *only money demands or claims for damages.*

Mr. *B. E. O'Conor*, for the respondent, submitted that section 8 of the Limitation Act applied to a suit of this kind. The elder brother had full power to give a discharge in his capacity of an elder brother and karta of the joint family. Any discharge granted by him in the latter capacity would be binding and could only be impugned if shown to be in fraud of the interests of the joint family. He could have sued to get the alienation set aside, and could have carried on the litigation alone in his capacity of head of the family. If therefore after attaining majority he took no steps to impugn the alienation made by the mother, time would begin to run from the time he attained majority, and limitation would operate equally against the younger brother. The elder of the family always acted as manager. No formal appointment was necessary — *Vigneswara* v. *Bapayya* (2), *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (3).

Mr. *Nehal Chand* in reply cited *Manzur Ali* v. *Mahmud-un-nissa* (4), and *Ahinsa Bibi* v. *Abdul Kader Saheb* (5).

RICHARDS and GRIFFIN, JJ.—This was a suit to recover possession of certain zamindari property. The plaintiffs are the sons

(1) (1898) I. L. R., 25 Calc., 909.
(2) (1893) I. L. R., 16 Mad., 436.
(3) (1887) I. L. R., 14 Calc., 50.
(4) (1902) I. L. R., 25 All., 155.
(5) (1902) I. L. R., 25 Mad., 26.

1908

GANGA DAYAL v. MANI RAM.

of one Baji Lal, who died on the 19th of August 1884. After his death, his widow, Musammat Parbati, was appointed guardian of the persons and property of the plaintiffs, who were then minors. An application was then made to the court for leave to sell a 5 anna 4 pie share in the village and a 7 anna 4 pie share in another village. The District Judge sanctioned this sale on the terms that the defendant No. 1 in this suit, Mani Ram, should give a clear receipt for all that was due to him. The consideration for the sale was to be Rs. 8,400. Instead of carrying out this sale, a sale of a totally different nature was made. The property sold was not the same property which the Judge did give permission to sell, and instead of the minors' getting a clear receipt for all debt that was due to Mani Ram, a sum of Rs. 1,000 only was placed to their credit. It would appear that Mani Ram and the defendants Nos. 2 and 3 had also a mortgage of a part of the property. This they foreclosed, although it was the intention of the sale which the Judge had permitted that the mortgage should be extinguished, at least so far as the minors and their property were concerned. This sale took place on the 23th of April 1886. The plaintiff No. 1 attained majority, according to the finding of the court below, more than 15 years before the institution of the present suit. The suit, however, was brought within three years of the plaintiff No. 2 attaining his majority. In the lower appellate court the suit was determined on the question of limitation, the learned Judge being of opinion that inasmuch as plaintiff No. 1 was of full age he was entitled "to give a discharge" within the meaning of section 8, Limitation Act, and that accordingly the right of plaintiff No. 2 was also barred.

Section 18 of Act XL of 1858 (which was in force at the date of the sale to Mani Ram) provided that no such person (*i. e.* the guardian) shall have power to sell or mortgage any immovable property, or to grant a lease of the estate for any period exceeding five years without an order of the civil court previously obtained. The sale which Musammat Parbati was induced to make was not in any sense the sale sanctioned by the District Judge. Section 30 of Act No. VIII of 1890 provides that the disposal of immovable property by a guardian in contravention of certain provisions of that Act is *voidable*. The older Act contains no

corresponding provision, and in our judgment the sale by Musammat Parbati was absolutely null and void. The only question accordingly that we have to decide is whether or not the plaintiffs are entitled to the benefit of the provisions contained in the last portion of section 8, Limitation Act, No. XV of 1877. That section provides as follows:—" when one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: *but where no such discharge can be given*, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." The cause of action in the present case unquestionably arose when the defendants took possession in 1886. Section 7 of the last-mentioned Act appears to apply to the case of a sale, plaintiff or applicant being under some disability or to the case of all plaintiffs or applicants being under *disability*. The section was so construed by a full Bench of the Madras High Court in the case of *Periasami* v. *Krishna Ayyan* (1) and accordingly plaintiffs cannot succeed unless they come under the provisions of section 8 and can show that neither of them was capable of giving a discharge without the concurrence of the other. It is a little difficult to understand the meaning of the expression when " a discharge can be given without the concurrence of such person," and we may note that the word " claimants " in section 8 has been omitted from the corresponding section of the new Limitation Act, No. IX of 1908.

As a member of a joint Hindu family, it is quite clear that the plaintiff No. 1 could not have sued alone to recover possession of the joint *property*. If his brother did not join as plaintiff, it would have been necessary for him to take advantage of the provisions of the Code of Civil Procedure and to make him a defendant. It is equally clear that the plaintiff No. 1 could not have sold or mortgaged the property without the concurrence of his brother plaintiff No. 2. One case cited was *Vigneswara* v. *Bapayya* (2). That was a suit by two sons to set aside the sale on the ground that it was *illegal as contravening the provisions* of section 99, Transfer of Property Act. The suit was clearly

(1) (1902) I. L. R., 25 Mad., 431 (2) (1893) I. L. R., 16 Mad., 436.

1903

GAJADHAR v. MUSAMMAT KAUNSILLA.

decreed the claim. The lower appellate court (Small Cause Court Judge with powers of a Subordinate Judge) modified the decree by dismissing the claim in respect of that portion of the arrear which had accrued due since the date of remarriage.

The plaintiff appealed, and KNOX, J., reversed the decree of the lower appellate court and restored that of the first court. The judgment is reported in the Weekly Notes for 1903, p. 149, s.v. *Kaunsilla* v. *Gajadhar*. The defendants appealed under section 10 of the Letters Patent.

The Hon'ble Pandit *Sundar Lal* (with him Babu *Durga Charan Banerji*), for the appellants contended that according to Hindu conception marriage is a sacrament. Its effect is to unite the husband and wife and to transfer the latter into the *gotra* of the former so that the two persons become one person. When the husband dies he is considered as surviving in the wife. She gets maintenance as the wife or widow, as the case may be, of the person to whom she was married. If she does some act whereby a change occurs in her status as such, the right to get maintenance also comes to an end. Remarriage, it is submitted, is one of such acts being, as it is, a complete severance of her connection with the family of her husband. According to the doctrine of Hindu law it is civil death, and its effect upon the right to get maintenance is the same as if she were actually dead. The decree that was given to her was in her capacity as the wife of her husband, and when she ceased to be that wife her right also ceased. As the widow of her former husband she would get maintenance, but that character also is lost when she remarries. The right to receive maintenance being a recurring right, subsequent conduct although not positive unchastity, would entail its forfeiture. As authority for this position reliance was placed upon West and Buhler's *Hindu Law*, 2nd edition, Vol. II, p. 999.

The Act XV of 1856 only legalises remarriage of widows, but does not take into consideration the consequences that would arise from such remarriage. The general principles of Hindu law would apply. *Murugayi* v. *Viramakali* (1).

The cases in this High Court as to the effect of the Act have not been approved of by the other High Courts, and the [illegible]

(1) (1877) I. L. R., 1 Mad., 226.

1908

GAJADHAR v. MUSAMMAT KAUNSILLA.

catena of authorities, Full Bench and other authorities. Reliance was also placed upon the remarks of RANADE, J., in *Panchappa* v. *Sanganbasawa* (1).

The ground on which the obligation to pay maintenance rests is, in the case of the husband, moral and, in that of the father-in-law who has property of the husband in his hands, legal. That being the correct principle, it is submitted that the right and the relationship are co-ordinate: with the cessation of the one, the other also goes. Reliance was placed, besides the cases cited in the judgment, upon *Surampalli Bangaramma* v. *Surampalli Brambaze* (2).

In the present case, the second husband is the person under obligation to maintain his wife, by reason of the connection. The former husband and the person deriving title through him are absolved, as the plaintiff cannot be regarded either the wife or the widow of her former husband.

Babu *Sital Prasad Ghose* (with him Babu *Mangal Prasad Bhargava*), for the respondent.

The case has been argued on the supposition of those cases which relate to the three higher castes among whom marriage is a sacrament. The parties are *Halwais*, and that strict view of the marriage tie does not prevail among them. Remarriage is sanctioned by custom among them. Further, a court of justice has declared the plaintiff's right to receive maintenance and made it a charge upon the property. Unless something in the texts or in decided cases is shown limiting or extinguishing this right, she cannot be deprived of it.

[He read from p. 95 in I. L. R., 24 Bom, and submitted that the case was no authority for the particular point.]

In the absence of such authority what the appellants can invoke in aid of their position is the text of *Narada*, in which the only case which will entail the forfeiture of the right of maintenance is that of the wife's not "keeping unsullied the bed of her lord." In the caste to which the parties belong it cannot be said that by remarriage the widow has not kept the bed of her lord unsullied, remarriage being lawful among them. The case in I. L. R., 1 Mad., 226, has no bearing. There being a decree

(1) (1899) I. L. R., 24 Bom., 89. (2) (1908) I. L. R., 31 Mad., 338.

1908

GAJADHAR v. MUSAMMAT KAUNSILLA.

of court the fact of her remarrying will not nullify it, unless the decree so provided.

The Hon'ble Pandit *Sundar Lal* replied.

BANERJI, J.—The question in this appeal is whether a Hindu widow, who according to the custom of her caste is allowed to re-marry, forfeits upon remarriage her right to the maintenance decreed to her against the estate of her first husband.

The plaintiff, Musammat Kaunsilla, belongs to the caste of *Halwais* or confectioners. She was first married to one Sahtu and in 1881 brought a suit against him and transferees from him for her maintenance. On the 6th of September 1881 a decree was passed in her favour fixing Rs. 5 a month as her maintenance, which was declared to be a charge on the estate of her husband in the possession of certain donees from him. The husband died subsequently, but the transferees of the property continued to pay her the maintenance decreed to her. In 1905 she married a second time and thereupon the defendants who are in possession of the property refused to pay the maintenance. She accordingly brought the present suit for recovery of arrears of maintenance by sale of her first husband's property now in the hands of the defendants. It has been found that according to the custom of the caste to which she belongs remarriage is permissible and is valid. The defendants contended that by marrying a second time she forfeited her right to maintenance. The court of first instance decreed he claim in part. The lower appellate court set aside that decree and dismissed her suit. Upon second appeal to this court the learned Judge who heard it reversed the decree of the lower appellate court and restored that of the court of first instance. From his judgment this appeal has been preferred under the Letters Patent. It is urged on behalf of the appellants that Act No. XV of 1853 applies to the case and that under section 2 of the Act the plaintiff by marrying a second time forfeited her right to maintenance from the estate of her first husband. It is also contended that remarriage dissolves the relationship between the widow and the family of her first husband and as the right to maintenance is founded on relationship, it ceases as soon as the relationship is put an end to by

remarriage. In support of these contentions the learned Advocate for the appellants relied on the rulings of the Calcutta High Court in *Matungini Gupta* v. *Ram Rutton Roy* (1) and *Rasul Jehan Begam* v. *Ram Surun Singh* (2); of the Bombay High Court in *Vithu* v. *Govinda* (3) and *Pinchappa* v. *Sanganbasawa* (4) and of the Madras High Court in *Murugayi* v. *Viramakali* (5). He also referred to West and Buhler's *Hindu Law*, Vol. II, p. 909.

Had the question not been concluded by the rulings of this court I should be inclined to accede to the contentions of Pandit *Sundar Lal*. But as the course of rulings in this court has been uniform, I feel myself bound by those rulings whatever my personal opinion may be. In *Har Saran Das* v. *Nandi* (6) it was held by STRAIGHT and BRODHURST, JJ., that a widow belonging to the sweeper caste, in which there was no obstacle against the remarriage of widows, did not by marrying again forfeit her interest in the property left by her first husband and that Act No. XV of 1856 did not apply to the case of such a widow. A similar view was held by STRAIGHT and TYRELL, JJ., in *Dharam Das* v. *Nand Lal Singh* (7), which was the case of a widow belonging to the Ahir caste. In the case of a widow of the Kurmi caste, *Ranjit* v. *Radha Rani* (8), BLAIR and AIKMAN, JJ., followed the above rulings and observed:—"Several unreported cases have all been decided in this court in the same way. We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent *cursus curiæ* in this court." According to these rulings not only is Act No. XV of 1856 inapplicable in the case of a widow who is permitted by the custom of her caste to remarry, but she does not forfeit the property inherited by her from her first husband. The effect of these rulings, therefore, is that the relationship with the family of her first husband does not come to an end, and she does not by remarrying forfeit her right to maintenance. Unchastity may entail a forfeiture of her right to maintenance, but it cannot be said that a widow who has married again has thereby become unchaste. I may observe that Mr. *Sundar Lal* has not based his contention on this ground.

(1) (1891) I. L. R., 19 Calc., 289.
(2) (1895) I. L. R., 22 Calc., 589.
(3) (1898) I. L. R., 22 Bom., 321.
(4) (1899) I. L. R., 24 Bom., 87.
(5) (1877) I. L. R., 1 Mad., 226.
(6) (1889) I. L. R., 11 All., 330.
(7) Weekly Notes, 1889, p. 78.
(8) (1898) I. L. R., 20 All., 476.

1908

GAJADHAR v. MUSAMMAT KAUNSILLA.

He urges that the right to maintenance has ceased because the relationship with the first husband's family has ceased; but in view of the rulings to which I have referred this contention cannot be accepted. If the widow even after remarriage is entitled to retain the estate of her first husband, she is *afortiori* entitled to receive the maintenance fixed for her by the decree passed against her husband and against the transferees of his estate. The appeal therefore fails and must be dismissed.

STANLEY, C.J.—I agree in the proposed order.

Appeal dismissed.

1908
December 23.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HAR PRASAD (DEFENDANT) v. RAGHUNANDAN PRASAD AND OTHERS (PLAINTIFFS) *

Act No. IV of 1882 (Transfer of Property Act), sections 82 and 100—Mortgage—Effect of satisfaction of entire mortgage debt by one co-mortgagor—Charge—Subrogation.

Held (1) that a mortgagor who discharges the whole mortgage debt obtains thereby a charge on his co-mortgagor's share of the mortgaged property in respect of the amount paid by him in excess of the share of the mortgage debt for which he is proportionately liable; and (2) that such charge takes priority over a subsequent mortgage on the same property created by one of the other co-mortgagors. *Bhagwan Das* v. *Har Dei* (1) and *Panchan Singh* v. *Ali Ahmad* (2) referred to.

THE facts of this case are as follows:—

On the 25th May, 1892, Umrao and Piare Lal executed a mortgage in favour of Brij Lal and Lala Nar[illegible]e Mal for Rs. 2,500. On the 6th of January, 1890, Shib Lal and Piare Lal ancestors of defendants Nos. 1, 2 and 3, had executed a mortgage in favour of one Ghumi Mal. The whole of the mortgage-money due under the bond was alleged to have been paid off by Har Prasad alone, son of Shib Lal, after the mortgage of the 25th of May, 1892, was executed. The present suit was brought by the mortgagees to enforce their mortgage of the 25th May, 1892. To this suit, Har Prasad, son of Shib Lal, was made a defendant on his application. He contended that he had paid Piare Lal's share also of

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* First Appeal No. 66 of 1907, from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 7th of December 1906.

(1) (1903) I. L. R., 25 All., 227. (2) (1881) I. L. R., 4 All., 58.

the mortgage money due under the mortgage of 6th January, 1890, and so had acquired the title of a prior mortgagee in respect of the mortgage money due from Piare Lal and the property hypothecated. The Lower Court (Subordinate Judge of Bareilly) held that he had acquired no charge by the payment he claimed to have made. The defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, submitted that a co-debtor had a charge over his other co-debtor's property for any payment made on his behalf. The charge no doubt arose on the date of payment, but as Har Prasad discharged a prior debt, he was entitled to priority. To ascertain priority, the date of the debt which was discharged should be looked to and not the date of actual payment. There was no difference in principle between the position of a subsequent mortgagee in this respect and that of a subsequent charge holder. He cited *Bhagwan Das* v. *Har Dei* (1).

Dr. *Satish Chandra Banerji* (with him Pandit *Moti Lal Nehru*), for the respondents, admitted in view of the rulings of this court, that Har Prasad would acquire a charge, but contended that the charge had not a retrospective effect. Section 74 of the Transfer of Property Act dealt with the right of a subsequent mortgagee to pay off a prior mortgage and under that section the subsequent mortgagee acquired all the rights of the prior mortgagee. The language of section 95, however, was different. It only gave the co-mortgagee a charge which was distinct from a mortgage. Section 100 dealt with charges.

A mortgagor paying off the entire debt would not become the prior mortgagee or step into his shoes, nor would a co-mortgagor. The latter's charge would come into existence when the payment was made and there was no analogy between this right of the co-mortgagor and the right by subrogation which the subsequent mortgagee acquired under section 74. A statutory charge was not to be confounded with a mortgage.

Babu *Jogindro Nath Chaudhri* replied.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit for sale on a mortgage executed on the 25th of May, 1892, by two persons, Umrao and Piare Lal. One of the properties

(1) (1903) I. L. R., 26 All., 227.

1908

HAR PRASAD v. RAGHUNANDAN PRASAD.

mortgaged is a five-biswa share in the village Meadi Khurd. A two-biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January, 1890. To this mortgage Shib Lal, the father of Har Prasad, defendant, was also a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad, had paid to Ghumi Mal before they could bring to sale a two-biswa share of the village Meadi Khurd. This contention was overruled by the court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal; and second that even if he acquired a charge he could not enforce it against the plaintiffs, who were puisne mortgagees. The correctness of these findings is impugned in this appeal which was brought by Har Prasad.

The lower court's view that a mortgagor, who discharges a simple mortgage, does not thereby acquire a charge on the property of his co-mortgagor comprised in the mortgage for a rateable share of the debt, is clearly erroneous. By virtue of the provisions of sections 82 and 100 of the Transfer of Property Act a charge is acquired by a co-mortgagor redeeming a mortgage. This was held in *Bhagwan Das* v. *Har Dei* (1). If therefore Har Prasad, who upon the death of his father, Shib Lal, became the co-mortgagor of Piare Lal in respect of the mortgage of the 6th of January, 1890, discharged that mortgage, he acquired a right to obtain contribution from Piare Lal and a charge for the amount of the contribution on Piare Lal's two-biswa share.

The next question is whether this charge can take priority over the plaintiffs' mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired we think priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee or the purchaser of the equity of redemption who pays off a prior mortgage, acquires, on equitable grounds, priority over a puisne

(1) (1903) I. L. R., 26 All., 227.

mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt he discharges, a co-mortgagor is equally subrogated. It was held by this Court in *Pancham Singh* v. *Ali Ahmad* (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee. The same rule is applied by the courts in America. It is thus stated in Jones on *Mortgages*, Vol. I, para. 877 :—" When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances . . . . In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it" In the present case Har Prasad, who was one of the mortgagors, was entitled to redeem Ghumi Mal, but he was under no obligation as between himself and Piare Lal to pay the latter's share of the debt. He could not redeem the mortgage piecemeal and was therefore bound to pay the whole amount of the mortgage. If he paid that amount he was by such payment subrogated to the rights of the mortgagee and was entitled to priority over the subsequent mortgagees, who appear from their mortgage deed to be the sons of the prior mortgagee whose prior mortgage is mentioned in that deed. We have not been referred to any authority in support of the view of the learned Subordinate Judge. For the reasons

(1) (1881) I. L. R., 4 All., 58.

1908

HAR PRASAD *v.* RAGHUNANDAN PRASAD.

mortgaged is a five-biswa share in the village Meadi Khurd. A two-biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January, 1890. To this mortgage Shib Lal, the father of Har Prasad, defendant, was also a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad, had paid to Ghumi Mal before they could bring to sale a two-biswa share of the village Meadi Khurd. This contention was overruled by the court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal; and second that even if he acquired a charge he could not enforce it against the plaintiffs, who were puisne mortgagees. The correctness of these findings is impugned in this appeal which was brought by Har Prasad.

The lower court's view that a mortgagor, who discharges a [illegible] mortgage, does not thereby acquire a charge on the pro- [illegible] co-mortgagor comprised in the mortgage for a rate- [illegible] erroneous. By virtue of the

[illegible] Property [illegible] mortgage. [illegible] therefore [illegible] came [illegible] the

hammadan to one of his wives with intent to [illegible] dower.

A few days after the institution of a suit again[illegible] for recovery of her dower, a Muhammadan, who had two [illegible] bulk of his property to his second wife in satisfaction of [illegible] Held, on suit by the first wife to have the transfer [illegible] aside, that such transfer was not necessarily unimpeachable, [illegible] necessary to find, first, that the transfer was a real, and not [illegible] transaction; and, secondly, that the second wife had not co[illegible] her husband in carrying out the transaction in question for th[illegible] purpose of defeating the claim of the first wife.

The facts out of which this appeal arose are as follow[illegible]

[illegible] had two wives, Hamid-un-nis[illegible] [illegible] On the 1st December 1904, Hamid-[illegible]

[illegible] from a decree of C. Rustomjee [illegible] confirming a decree of [illegible] dated the 16[illegible]

mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purcha or of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt he discharges, a co-mortgagor is equally subrogated. It was held by this Court in *Pancham Singh* v. *Ali Ahmad* (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee. The same rule is applied by the courts in America. It is thus stated in Jones on *Mortgages*, Vol. I, para. 877 :—" When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances . . . . In such case no proof of intent appears that the appellant, Hamid-un-
live is necessary to g dower from her husband and instituted nent of the mortgage, of it on the 1st of December 1904. Five of his title to streu tution of this suit Ali Jawad made the transfer Har Prasad, wed in this suit. On the 22nd of February 1905 edeem Ghumi ppellant obtained a decree for her dower amount himself and 300, and forthwith proceeded to execute her decree. could not isted by the defendant respondent, Musammat Nazir-bound to led in consequence the suit out of which this appeal has amount be instituted.

mortgag ourt of first instance dismissed the plaintiff's claim. gagee appeal the learned District Judge affirmed the decision of the ourt below

dee (1) (1886) I. L. R., 8 All., 178. (2) Weekly Notes, 1901, p. 64.
th Weekly Notes, 1901, p. 67.

1909

HAMID-UN-NISSA BIBI v. NAZIR-UN-NISSA.

We refer the above issue to the learned District Judge under order 41, rule 25, Civil Procedure Code. These issues he will determine upon the evidence already before him. On return of the findings the parties will have the usual ten days for filing objections.

Issues remitted.

1909 *January* 8

Before Sir John Stanley, knight, Chief Justice, and Mr Justice Banerji.

RAM KUMAR SINGH (DEFENDANT) *v.* ALI HUSAIN AND OTHERS (PLAINTIFFS).*

Suit for damages against joint tort feasors—Compromise between plaintiff and one of the defendant—such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants *Held* that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. *Brinsmead* v. *Harrison* (1) and *Thurman* v. *Wild* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of RICHARDS, J. The facts are stated in the judgment under appeal, which was as follows:—

"This was a suit for damages for assault. Before the institution of the present suit criminal proceedings had been commenced against some 12 persons, with the result that 8 out of 12 were convicted. The criminal proceedings were followed by the present proceedings in the Civil Court for damages against the same 12 persons. Before the suit was tried one of the four persons who had been acquitted by the Criminal Court entered to a compromise with the plaintiff. The suit then ... acts complained of, from the defendants, with the result ...smead v. ... one of the tort-... 8 persons who had damages for ... of a piano and damage, only ... as against him. ... that case it was held that a suit ... by ... one other tort-feasor ... not be sustained for the same cause of action, notwithstanding ... the judgment already recovered remained ... That is a very different case from the case before ... case before us all the tort-feasors were sued in one ... suit and judgment was not recovered only against ... who had admitted his liability in the progress of the suit

(1) (1872) L. R., 7 C. P., 547.

VOL. XXXI.] [PART V.



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Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ... 3 a. 6 p (1 a)

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Act XVII of 1864 (Official Trustees), as modified up to 1st July, 1890 ... 5 a. 6 p. (1 a)

Act III of 1865 (Carriers), as modified up to 31st May, 1903 ... ... 3 a. (1 a)

Act X of 1865 (Succession), as modified up to 1st July, 1890 ... ... Re. 1-8. (2 a)

Act III of 1867 (Gambling), as modified up to 1st January 1905 ... 4 a. (1 a)

Act V of 1869 (Indian Articles of War), as modified up to 1st December, 1904 ... ... Re. 1 2. (3 a.)

Act XX of 1869 (Volunteers), as modified up to 1st May, 1896 ... ... 4 a. 9 p. (1 a)

Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1906 ... 6 a. (1 a)

Act IV of 1872 (Panjab Laws), as modified up to 1st November, 1904 ... 7 a (1 a)

Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904 ... ... 10 a (2 a)

Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1899 ... ... 3 a. 6 p. (1 a)

Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... ... 3 *a.* 9 *p.* (1 *a.*)

Act II of 1874 (Administrator-General), as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act .. 11 *a.* (2 *a.*)

Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901 ... ... 6 *a.* 6 *p.* (1 *a.*)

Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895 ... ... 6 *a.* (1 *a.*)

Act XV of 1874 (Laws Local Extent), as modified up to 1st October, 1895 ... 7 *a.* (1 *a.*)

Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906 ... 2 *a.* (1 *a.*)

Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... 11 *a.* (1 *a.* 6 *p.*)

Act III of 1877 (Registration), as modified up to 1st August, 1905 ... 11 *a.* (2 *a.*)

Act VII of 1878 (Forests), as modified up to 1st December, 1903 ... 10 *a.* (2 *a.*)

Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 ... ... 6 *a.* (1 *a.* 6 *p.*)

Act XVII of 1879 (Dekkhan Agriculturists' Relief, as modified up to 1st March, 1895 ... ... 10 *a.* (2 *a.*)

Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 ... 7 *a.* 6 *p.* (1 *a.*)

Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891 ... ... 10 *a.* (2 *a.*)

Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890 ... ... 12 *a.* (2 *a.*)

Act XV of 1881 (Factories), as modified up to 1st December, 1904 ... 5 *a.* 6 *p.* (1 *a.* 6 *p.*)

Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897 .. .. 10 *a.* (1 *a.*)

Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905 ... ... Re. 1-2. (2 *a.*)

Act II of 1882 (Trusts), as modified up to 1st June, 1903 ... ... 10 *a.* (1 *a.*)

Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 . .. . 15 *a.* (2 *a.*)

Act V of 1882 (Indian Easements) as amended by the Repealing and Amending Act, 1891 (XII of 1891) ... ... 8 *a.* (1 *a.*)

Act VI of 1882 (Companies), as modified up to 1st August, 1906 .. Re. 1-10 *a.* (3 *a.*)

Act XII of 1882 (Salt), as modified up to 1st December 1890 .. 6 *a.* (1 *a.*)

Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899 ... ... Rs. 3. (6 *a.*)

Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906 ... ... 10 *a.* (2 *a.*)

Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904 ... ... 6 *a.* (1 *a.*)

Act VIII of 1883 (Little Cocos and Preparis Island), as modified up to 1st October, 1902 .. .. 1 *a.* 3 *p.* (1 *a.*)

Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... ... 2 *a.* 6 *p.* (1 *a.*)

Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ... 11 *a.* (2 *a.*)

Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ... 9 *a.* (2 *a.*)

Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ... 6 *a.* (1 *a.*)

Act XII of 1884 (Agriculturists, Loans), as modified up to 1st February, 1903 ... . 2 *a.* (1 *a.*)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... ... 7 *a.* (1 *a.*)

Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905 ... 5 *a.* (1 *a.*)

Act II of 1886 (Income-tax), as modified up to 1st April 1903 ... ... 9 *a.* (1 *a.* 6 *p.*)

Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ... ... [illegible]

Act X of 1886 (Tramways), as modified up to 1st December, 1903 ... [illegible]

Act XIII of 1886 (Securities), as amended by Act XII of 1891 ... ... [illegible]

Act VII of 1887 (Suits Valuation), as modified up to 1st October, 1906 ... [illegible]

Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... ... 6 a. (1 a)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... 8 a. (1 a)
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ... ... 3 a. (2 a)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 a. 9 p. (1 a.)
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... ... 5 a. 6 p. (1 a)
Act X of 1889 (Ports), as modified up to 1st April, 1901 ... ... 11 a. (2 a)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ... 7 a. (1 a)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 .. 3 a (1 a)
Act IX of 1890 (Railways), as modified up to 1st June, 1905, with an Index ... ... Re. 1-3. (2 a)
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ... ... 2 a. 3 p (1 a.)
Act XII of 1891 (Repealing and Amending Act), shewing the schedules as modified up to 31st May, 1902 .. .. 12 a. (1 a. 6 p.)
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... ... 1 a. 3 p. (1 a.)
Act I of 1894 (Land Acquisition), with footnotes ... ... 7 a. (1 a)
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 .. ... 9 a (2 a.)
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 .. 7 a. 6 p. (1 a. 6 p)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... 1 a 6 p. (1 a.)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1903 ... ... Rs. 3-10. (8 a)
Act VIII of 1899 (Petroleum), as modified up to 1st December, 1904 ... 7 a. (1 a)
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... . 1 a (1 a)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 .. ... 6 a. 6 p. (1 a.)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... 5 a 6 p. (1 a)
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... . 6 a. 6 p. (1 a)
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... .. 1 a. 9 p. (1 a)
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a)
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 ... . 13 a. (3 a.)
Regulation VI of 1886 (Ajmer Rural Boards) as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a)
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891 ... ... 5 a. (1 a)
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... 4 a. 9 p (1 a)
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 ... ... 6 a (1 a)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1903.
Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1873 to 1903. 8vo. Stitched.
(The above may be obtained separately. The price is noted on each).

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1903, with foot notes brought down to 1st December, 1901... In Urdu. 3 a. 6 p.
Act XX of 1847 (Copyright), as modified up to 1st May, 1899 ... ... In Urdu. 1 a. 3 p.

Act	Edition and price
Act XX of 1847 Copyright as modified up to 1st May, 1896	In Nagri. 1 *a*. 3 *p*. (1 *a*.)
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes ...	In Urdu 6 *p* (1. *a*)
Ditto ditto	In Nagri. 6 *p*. (1 *a*.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 ...	In Urdu. 6 *p* (1 *a*.)
Ditto ditto ...	In Nagri 6 *p*. (1 *a*)
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 ...	In Urdu 6 *p*. (1 *a*)
Ditto ditto ...	In Nagri. 6 *p*. (1 *a*)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	In Urdu. 3 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 3 *p*. (1 *a*.)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903...	In Urdu. 6 *p*. (1 *a*)
Ditto ditto ...	In Nagri. 6 *p* (1 *a*)
Act XX of 1856, as modified up to 1st November, 1903	In Urdu. 2 *a*. 6 *p*. (1 *a*.)
Ditto ditto	In Nagri. 2 *a*. 6 *p*. (1 *a*)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	In Urdu. 1 *a* (1 *a*)
Ditto ditto ...	In Nagri. 1 *a*. (1. *a*.)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	In Urdu. 1 *a* (1. *a*)
Ditto ditto ...	In Nagri. 1. *a* (1 *a*)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 ..	In Urdu. 1 *a*. 6 *p*. (1 *a*.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	In Urdu. 3 *p*. (1 *a*)
Ditto ditto ...	In Nagri. 3 *p*. (1 *a*.)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	In Urdu. 3 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 3 *p*. (1 *a*.)
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903 ...	In Urdu. Re. 1-5 (5 *a*.)
Ditto ditto ...	In Nagri. Re. 1-5 (5 *a*.)
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu. 2 *a*. 9 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 2 *a* 9 *p*. (1 *a*.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898 ...	In Urdu. 1 *a*. 3 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 1 *a*. 3 *p*. (1. *a*.)
Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ...	In Urdu. 1 *a*. (1 *a*.)
Ditto ditto ...	In Nagri. 1 *a* (1 *a*)
Act VI of 1864 (Whipping), as modified up to 1st April, 1900 ...	In Urdu. 1 *a*. 6 *p*. (1 *a*.)
Ditto ditto ...	In Nagri 1 *a*. 6 *p*. (1 *a*.)
Act III of 1865 (Carriers) as modified up to 31st May, 1903 ...	In Urdu. 9 *p*. (1 *a*).
Ditto ditto ...	In Nagri. 9 *p*. (1 *a*)
Act III of 1867 (Gambling), as modified to 1st December, 1895 ...	In Nagri. 2 *a*. (1 *a*.)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895	In English, Urdu, and Nagri. Bound. Rs. 3 (5 *a*)
Ditto ditto ...	Unbound. Rs. 2-8. (5 *a*)
Act VII of 1870 (Court-fees), as modified up to 1st December, 1893 ...	In Urdu. 8 *a*. 3 *p*. (2 *a*. 6 *p*.)
Ditto as modified up to 1st October, 1893 ...	In Nagri. 8 *a* 3 *p*. (1 *a*)
Act I of 1871 (Cattle trespass) as modified up to 1st December, 1903 ...	In Urdu. 1 *a*. 9 *p*. (1 *a*.)
Ditto ditto ...	In Nagri. 1 *a*. 9 *p*. (1 *a*.)
Act XXIII of 1871 (Pensions)	In Urdu. 9 *p*. (1 *a*.)
Ditto	In Hindi. 9 *p*. (1 *a*.)
Act I of 1872 (Evidence), as modified up to 1st May, 1903	In Urdu. 8 *a*. (2 *a*.)
Ditto ditto	In Nagri. 8 *a* (2 *a*.)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 ...	In Urdu 2 *a*. 6 *p* (1 *a*. 6 *p*)
Act IX of 1872 (Contract), as modified up to 1st September, 1899 ...	In Urdu. 2 *a*. [illegible] (3 *a*)

Act IX of 1872 (Contract), as modified up to 1st September, 1899 ...	In Nagri. 9 a. 6 p. (3 a.)
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ...	In Urdu. 4 a. (2 a)
Ditto ditto ...	In Nagri. 4 a. (2 a.)
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1908	In Urdu. 9 p. (1 a)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899	In Urdu. 3 a. 8 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 8 p. (1 a)
Act X of 1873 (Oaths), as modified up to 1st February, 1903	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. (1 a)
Act IX of 1875 (Majority), as modified up to 1st May, 1906	In Urdu. 3 p. (1 a)
Ditto ditto	In Nagri. 3 p. (1 a)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ...	In Urdu. 4 a. 6 p. (1 a 6 p.)
Ditto ditto ...	In Nagri. 4 a. 8 p (1 a 6 p)
Act III 1877 (Registration), as modified up to 1st December, 1896 ...	In Urdu. 4 a. 3 p. (2 a.)
Ditto ditto ...	In Nagri. 4 a. 6 p. (2 a)
Act I of 1878 (Opium), as modified up to 1st December, 1896 ...	In Nagri 1 a. 6 p (1 a)
Act VII of 1878 (Forests), as modified up to 1st December 1903 ...	In Urdu. 4 a. (1 a 6 p)
Ditto ditto ...	In Nagri. 3 a. 9 p. (1 a. 6 p)
Act XI of 1878 (Arms), as modified up to 1st May, 1904	In Urdu. (2 a. (1 a.)
Ditto ditto	In Nagri. 2 a. (1 a)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902	In Urdu. 2 a. (1 a)
Ditto ditto ...	In Nagri. 2 a. (1 a.)
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1898	In Urdu. 2 a. 6 p. (1 a)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a)
Act XV of 1881 (Factories), as modified up to 1st April, 1891 ...	In Urdu. 1 a. 6 p (1 a)
Ditto ditto ...	In Nagri. 1 a. 6 p. (1 a)
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898	In Urdu. 9 a. (1 a. 6 p)
Ditto ditto ...	In Nagri. 9 a. (1 a. 6 p)
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ...	In Urdu. 6 a. 9 p. (2 a)
Ditto Ditto ...	In Nagri. 6 a. 9 p. (2 a)
Act VI of 1882 (Companies), as modified up to 1st August, 1906 ...	In Urdu. 13 a. 9 p. (2 a)
Ditto ditto ...	In Nagri. 14 a. (3 a)
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December 1899	In Urdu. Re. 1-4 (6 a)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	In Urdu. 1 a. (1 a)
Ditto ditto ...	In Nagri. 1 a. (1 a)
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ...	In Urdu. 4 a. 9 p. (1 a. 6 p)
Ditto ditto ...	In Nagri. 4 a. 6 p. (1 a. 6 p)
Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ...	In Urdu. 1 a. 3 p. (1 a)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a)
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ...	In Urdu. 3 a 6 p. (1 a 6 p)
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a 6 p)
Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1906	In Urdu. 6 p (1 a)
Ditto ditto ...	In Nagri. 6 p. (1 a)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899...	In Urdu 2 a 6 p. (1 a)
Act II of 1885 (Negotiable Instruments Amendment). ...	In Urdu. 9 p. (1 a)
Act III of 1885 (Transfer of Property Amendment)	In Urdu. 3 p. (1 a)
Act X of 1885 (Oudh Estates Amendment)	In Urdu. 3 p. (1 a)
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ...	In Urdu. 1 a. 9 p. (1 a)
Act XXI of 1885 (Madras Civil Courts Amendment)	In Urdu 3 p. (1 a)

Act	Price
Act II of 1886 (Income tax), as modified up to 1st April, 1903	In Urdu 3 a. (1 a. 9 p.)
Ditto ditto ...	In Nagri. 3 a. (3 a. 9 p.)
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu 3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu. 1 a. 3 p. (1 a.)
Act VII of 1886 (Registration Amendments)	In Urdu. 3 p. (1 a.)
Act X of 1886 (Criminal Law Amendment)	In Urdu. 9 p. (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act VI of 1887 (Companies Amendment)	In Urdu. 3 p. (1 a.)
Act VII of 1887 (Suits' Valuation)	In Urdu. 9 p. (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu. 2 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships)	In Urdu. 1 a. 6 p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu. 3 a. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a.)
Act XV of 1887 (Burma Military Police), ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVIII of 1887 (Allahabad University)	In Urdu. 1 a. (1 a.)
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu 6 p. (1 a.)
Ditto (as passed)	In Nagri. 6 p. (1 a.)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu 3 p. (1 a.)
Ditto (as passed)	In Nagri. 3 p. (1 a.)
Act V of 1888 (Inventions and Designs)	In Urdu. 2 a. 3 p. (1 a.)
Act VI of 1888 (Debtors)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu. 1 a. 9 p. (1 a.)
Ditto	In Nagri. 1 a. 9 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	In Urdu 6 p. (1 a.)
Ditto ditto ...	In Nagri 6 p. (1 a.)
Act II of 1889 (Measures of Length)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri 2 a. (1 a.)
Act VI of 1889 (Probate and Administration)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri 6 p. (1 a.)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu. 5 a. (2 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri. 3 a. (1 a. p.)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894 ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVI of 1889 (Central Provinces Land Revenue) ...	In Urdu. 1 a. 6 p. (1 a.)
Ditto	In Nagri 1 a. 6 p. (1 a.)
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu. 3 p. (1 a.)
Act I of 1890 (Revenue Recovery)	In Urdu. 3 p. (1 a.)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu. 3 p. (1 a.)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu. 6 p. (1 a.)
Act VI of 1890 (Charitable Endowments)	In Urdu. 6 p. (1 a.)
Act VIII of 1890 (Guardians and Wards)	In Urdu. 2 a. 3 p. (1 a. 9 p.)
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu. 3 a. (2 a.)
Act IX of 1890 (Railways), as modified up to 1st [illegible]	In Nagri. 3 a. (2 a.)

Act	Language	Price
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu.	3 p. (1 a)
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu.	3 p. (1 a)
Act XVIII of 1890 (Emigration Amendment)	In Urdu	3 p. (1 a)
Act XIX of 1890 (Salt Amendment)	In Urdu.	3 p. (1 a)
Act XX of 1890 (North-Western Province and Oudh)	In Urdu.	1 a. (1 a)
Act V of 1891 (Ports Act Amendment)	In Urdu	3 p. (1 a)
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu.	3 p. (1 a)
Act XIV of 1891 (Oudh Courts)	In Urdu.	6 p. (1 a)
Act XVIII of 1891 (Bankers Books Evidence), as modified by Acts I of 1893 and XII of 1900	In Urdu.	3 p. (1 a.)
Ditto ditto ...	In Nagri.	6 p. (1 a)
Act II of 1892 (Christian Marriage Validation)	In Urdu.	3 p. (1 a)
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu.	6 p. (1 a)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ...	In Urdu	3 p. (1 a.)
Act IV of 1893 (Partition)	In Urdu.	3 p. (1 a.)
Act I of 1894 (Land Acquisition)	In Urdu.	2 a. 3 p. (1a. 6p)
Ditto	In Nagri.	1 a. 6 p. (1a. 6p)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment) ...	In Urdu	3 p. (1 a)
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu.	3 p (1 a.)
Ditto	In Nagri	3 p. (1 a.)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ...	In Urdu.	4 a. (1 a)
Ditto ditto	In Nagri.	3 a 9 p. (2 a)
Act IX of 1894 (Prisons)	In Urdu.	1 a. 3 p. (1 a)
Ditto	In Nagri.	2 a 3 p. (1 a)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu.	3 p. (1 a)
Ditto ditto ...	In Nagri.	3 p. (1 a)
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu.	3 a. (1 a)
Act XIV of 1895 (Pilgrim Ships)	In Urdu	1 a. 3 p. (1 a)
Act II of 1896 (Cotton-duties)	In Urdu.	1 a. 3 p. (1 a)
Ditto	In Nagri.	1 a. (1 a)
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu.	3 p. (1 a)
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu.	3 p. (1 a.)
Ditto	In Nagri.	3 p. (1 a)
Act XII of 1896 (Excise), as modified up to 1st August 1905	In Nagri.	3 a. 3 p. (1 a)
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu	3 p. (1 a)
Act III of 1897 (Epidemic Diseases)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	9 p. (1 a)
Act IV of 1897 (Fisheries)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu.	3 p. (1 a)
Ditto ditto	In Nagri	3 p. (1 a)
Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu.	3 p (1 a)
Ditto ditto	In Nagri	9 p (1 a)
Act VIII of 1897 (Reformatory Schools)	In Urdu.	3 p (1 a)
Ditto	In Nagri	9 p (1 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ...	In Urdu.	9 p. (1 a)
Ditto ditto ...	In Nagri	9 p (1 a)
Act X of 1897 (General Clauses)	In Urdu	1 a (1 a)
Ditto	In Nagri	1 a. (1 a)
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu	3 p. (1 a)
Ditto ditto	In Nagri	3 p. (1 a)
Act XV of 1897 (Cantonments)	In Urdu.	3 p. (1 a)
Act I of 1898 [Stage-carriages Act (1861) Amendment]	In Urdu.	3 p (1 a)

Act I of 1898 [Stage Carriages Act (1861) Amendment]	In Nagri. 3 p (1 a.)
Act III of 1898 (Lepers)	In Urdu. 6 p. (1 a)
Ditto	In Nagri. 6 p. (1 a)
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu 3 p. (1 a)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1900	In Urdu. Re 1-4 (8 a.)
Ditto ditto	In Hindi. Re 1 6 (8 a.)
Act VI of 1898 (Post Office)	In Urdu. 2 a (1 a)
Ditto	In Nagri. 2 a (1 a)
Act IX of 1898 (Live-stock Importation)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. - 3 p. (1 a)
Act X of 1898 (Indian Insolvency Rules)	In Urdu. 3 p (1 a)
Act [illegible] 1899 [Indian Marine Act (1887) Amendment] ...	In Urdu. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 6 p (1 a.)
Act II of 1899 (Stamp), as modified up to 31st August, 1905 ...	In Urdu. 7 a. 6 p. (1a. 0
Ditto ditto ...	In Nagri. 7 a 6 p (1a. 0p
Act III of 1900 (Prisoners), as modified up to 1st March, 1905	In Urdu. 2 a. 3 p. (1 a.)
Ditto ditto	In Nagri. 2 a. 3 p. (1 a.)
Act IV of 1899 (Government Buildings)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a)
Act VIII of 1899 (Petroleum)	In Urdu. 9 p. (1 a.)
Ditto	In Nagri. 9 p. (1 a.)
Act IX of 1899 (Arbitration)	In Urdu. 9 p. (1 a.)
Ditto	In Nagri. 9 p. (1 a.)
Act XI of 1899 (Court-fees Amendment)	In Urdu. 9 p. (1 a.)
Ditto ...	In Nagri. 9 p. (1 a.)
Act XII of 1899 (Currency Notes Forgery)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p. (1 a.)
Act XIV of 1899 (Tariff Amendment)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a)
Act XVII of 1899 (Indian Registration Amendment ...	In Urdu. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 p. (1 a)
Act XVIII of 1899 (Land Improvement Loans Amendment) ...	In Urdu. 3 p. (1 a)
Ditto ditto ...	In Nagri. 3 p. (1 a.)
Act XX of 1899 (Presidency Banks)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. [illegible]
Act XXI of 1899 (Central Provinces Tenancy Amendment) ...	In Urdu. [illegible]
Ditto ditto ...	In Nagri. [illegible]
Act XXIV of 1899 (Central Provinces Court of Wards) ...	In [illegible]
Ditto ditto ...	In [illegible]
Act I of 1900 (Indian Articles of War Amendment) ...	In [illegible]
Ditto ditto ...	In [illegible]
Act IV of 1900 [Indian Companies (Branch Registers)] ...	In [illegible]
Ditto ditto ...	In [illegible]
Act IX of 1900 (Amendment) of Court-fees Act, 1870) ...	[illegible]
Ditto ditto ...	[illegible]
Act X of 1900 (Census)	[illegible]
Ditto	[illegible]
Act II of 1901 [Indian Tolls (Army)]	[illegible]
Ditto	[illegible]
Act III of 1901 (Indian Ports)	[illegible]
Act V of 1901 [Indian Forest (Amendment)]	[illegible]
Ditto	[illegible]
Act VI of 1901 (Assam Labour and Emigration) ...	[illegible]

Act VI of 1901 (Assam Labour and Emigration)	... In Nagri. 5 a. (2 a)
Act VII of 1901 (Native Christian Administration of Estates)	... In Urdu. 3 p. (1 a)
Ditto ditto	... In Nagri. 3 p. (1 a)
	... In Urdu. 1 a (1 a)
Act VIII of 1901 (Mines)	... In Nagri. 1 a (1 a)
Ditto	... In Urdu. 3 p. (1 a)
Act IX of 1901	... In Nagri. 3 p. (1 a)
Ditto	... In Urdu. 3 p. (1 a)
Act X of 1901	... In Nagri. 3 p. (1 a)
Ditto	... In Urdu. 1 a (1 a)
Act II of 1902 [Cantonments (House-Accommodation)] ...	... In Nagri. 1 a. (1 a)
Ditto ditto ...	... In Urdu. 3 p (1 a)
Act IV of 1902 (Indian Tramways)	... In Nagri. 3 p. (1 a)
Ditto	... In Urdu. 3 p (1 a)
Act V of 1902 (Administrators General and Official Trustees) ...	... In Nagri. 3 p (1 a)
Ditto ditto ...	... In Urdu. 3 p (1 a)
Act VII of 1902 [United Provinces (Designation)] ...	... In Urdu. 3 p. (1 a)
Act VIII of 1903 (Indian Tariff)	... In Nagri. 3 p (1 a)
Ditto	... In Urdu 3 p. (1 a)
Act II of 1903 [Indian Post Office (Amendment)]	... In Nagri. (3 p 1 a)
Ditto	... In Urdu. 2 a 6 p. (1 a 6 p)
Act III of 1903 (Electricity)...	... In Nagri. 2 a. 6 p. (1 a 6 p)
Ditto	... In Urdu. 3 p. (1 a) (2 a 6 p)
Act V of 1903 (Ports)	... In Nagri 3 p (1 a)
Ditto	... In Urdu. 1 a 3 p. (1 a)
Act VII of 1903 (Works of Defence)	... In Nagri. 1 a. 3 p (1 a)
Ditto	... In Urdu. 3 p. (1 a)
Act VIII of 1903 (Probate and Administration)	... In Nagri 1 a 3 p (1 a)
Ditto	... In Urdu. 3 p (1 a)
Act IX of 1903 (Tea Cess)	... In Nagri. 3 p (1 a)
Ditto	... In Urdu. 3 p. (1 a)
Act X of 1903 (Victoria Memorial)	... In Nagri. 3 p. (1 a)
Ditto	... In Urdu. 3 p. (1 a)
Act XIII of 1903 (Lepers)	... In Nagri. 3 p (1 a)
Ditto	... In Urdu. 3 p. (1 a)
Act XIV of 1903 (Indian Foreign Marriages)	... In Nagri. 3 p (1 a)
Ditto	... In Urdu. 1 a. 9 p (1 a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	... In Nagri. 1 a. 9 p (1 a)
Ditto ditto	... In Urdu. 6 p. (1 a)
Act I of 1904 (Poisons)	... In Nagri. 6 p. (1 a)
Ditto	... In Urdu. 3 p (1 a)
Act III of 1904 (Local Authorities Loan)	... In Nagri. 3 p. (1 a)
Ditto	. In Urdu. 9 p. (1 a)
Act IV of 1904 (North-West Border Military Police) ...	.. In Urdu. 3 p. (1 a)
Act VI of 1904 [Transfer of Property (Amendment)] ...	... In Nagri. 3 p (1 a)
Ditto ditto ...	... In Urdu. 9 p (1 a)
Act VII of 1904 (Ancient Monuments Preservation) ...	... In Nagri. 9 p. (1 a)
Ditto ditto ...	... In Urdu. 1 a. 3 p (1 a)
Act VIII of 1904 (Indian Universities)	... In Nagri. 1 a 3 p (1 a)
Ditto	... In Urdu. 1 a. (1 a)
Act X of 1904 (Co-operative Credit Societies)	. In Nagri. 1 a (1 a)
Ditto	...
Act XI of 1904 to revive and continue section 8B of the Indian Tariff Act, 1894	... In Urdu. 3 p (1 a)
Ditto Ditto	... In Nagri. 3 p. (1 a)
Act XII of 1904 (Emigration)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p (1 a)

Act XIII of 1904 (Indian Articles of War) ... ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Act XV of 1904 [Indian Stamp (Amendment)] ... ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Act I of 1905 [Local Authorities Loan (Amendment)] ... ... In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Act II of 1905 [Indian Universities (Validation)] ... ... In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Act III of 1905 (Indian Paper Currency) ... . In Urdu. 9 *p.* (1 *a.*)
Ditto ... ... In Nagri. 9 *p.* (1 *a.*)
Act IV of 1905 *(Indian Railway Board)* ... ... *In Urdu. 9 p. (1 a.)*
Act VI of 1905 (Court-fees (Amendment) ... ... In Urdu. 1 *a.* 6 *p.* (1 *a.*
Ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Act VII of 1905 (Bengal and Assam Laws) ... ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Regulation I of 1890 (British Baluchistan Laws) ... ... In Urdu. 2 *a* (1 *a.* 9 *p*
Regulation V of 1890 (British Baluchistan Forests) ... ... In Urdu. 2 *a.* (1 *a.* 6 *p.*)
Regulation VI of 1893 (Hazara Forests) ... ... In Urdu. 2 *a.* (1 *a.* 6 *p.*
Regulation VIII of 1896 (British Baluchistan Criminal Justice) ... In Urdu. 9 *p* (1 *a*)
Regulation IX of 1896 (British Baluchistan Civil Justice) ... ... In Urdu. 2 *a.* 3 *p.* (1 *a.*)
Regulation III of 1901 (Frontier Crimes) ... ... In Urdu. 2 *a.* 6 *p.* (1 *a.*)
Regulation IV of 1901 (Frontier Murderous Outrages) ... ... In Urdu. 6 *p.* (1 *a.*)
Regulation VII of 1901 (North-West Frontier Province) ... ... In Urdu. 4 *a.* 3 *p.* (1 *a.*)

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TABLE OF CASES CITED.

PAGE.

INDEX.

HINDU LAW—*Mitakshara—Joint Hindu Family—Mortgage of joint family property by father—Liability of sons in suit to enforce*

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

A credito[illegible] ed by the fat[illegible] property is [illegible] was taken t[illegible] family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt.

So *held by* STANLEY, C.J., KNOX, J. and AIKMAN, J., concurring.

[illegible] executed by the father [illegible] mort- [illegible] was [illegible] necessity, on the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality.

Held by STANLEY, C. J., and KNOX and AIKMAN, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BANERJI, J. RICHARDS, J., concurring:—

taint [illegible] a deb[illegible] son and his interest in the [illegible] mortgage was incurred at [illegible] some date anterior to [illegible] nst the son to enforce [illegible] to prove that the debt [illegible] but it is for the son to [illegible] debt, it was not his

The following cases were referred to:—*Deli Dat* v. *Jadu Rai*, I. L. R., 24 All., 459, *Jamna* v. *Nain Sukh*, I. L. R., 9 All., 493, *Badri Prasad* v. *Madan Lal*, I. L. R., 15 All., 75, *Lal Singh* v. *Deo Narain Singh*, I. L. R., 8 All., 279, *Mashakal* v. *Gopal Misra*, Weekly Notes, 1901, p. 57, *Hanuman Kamat* v. *Daulat Mandar*, I. L. R. 10 Calc., 528, *Ram Dayal* v. *Ajudhia Prasad*, I. L. R., 28 All., 239, *Surja Prasad* v. *Golab Chand*, I. L. R., 27 Calc., 762,

PAGE.

committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff's claim as against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff's claim against the other defendants could not be sustained. Reliance was placed upon the leading case of *Brinsmead* v. *Harrison* (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of *Brinsmead* v. *Harrison*, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit

(1) (1872) L. R., 7 C. P., 547.

1909

RAM KUMAR SINGH v. ALI HUSAIN.

and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for the appellants is the case of *Thurman* v. *Wild* (1). This case does not appear to us to assist the appellants. In it an action was brought for damages for a trespass committed by the defendant as servant and by command of his master. It was held that the acceptance of satisfaction by the plaintiff from the master was a good defence to an action against the servant. The ground upon which this decision was arrived at is to be found in the judgment of LORD DENMAN at page 461 of the report. The passage runs as follows:—"He (*i. e.* the plaintiff) has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties, and whether this was rendered with or without the consent of some of them he is equally barred as against all." The ground, therefore, of this decision was that the plaintiff had accepted complete redress from one of two joint tort-feasors, and having done so he could not sustain a suit against the others. As LORD DENMAN says:—"He had accepted a compensation for the whole trespass and in discharge of all parties." We think under the circumstances that the learned Judge of this Court was perfectly right in dismissing the appeal to him and we accordingly dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

1909, March 5.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Richards.

CHANDRADEO SINGH AND OTHERS (DEFENDANTS) APPELLANTS *v.* MATA PRASAD AND ANOTHER (PLAINTIFFS) AND SHEO BABU SINGH AND OTHERS (DEFENDANTS) RESPONDENTS.*

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

* Second Appeal No. 1028 of 1907.

(1) (1840) 11 A. & E., 453.

A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage was taken to satisfy an antecedent debt or was justified by some family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt.

So *held* by STANLEY, C J., KNOX, J., and AIKMAN, J., concurring.

A mortgage of joint family property was executed by the father of a joint Hindu family who had sons living at the time. The mortgage was for valuable consideration but it was not shown that it was executed to meet any antecedent debt or for any family necessity. On the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality.

Held by STANLEY, C. J., and KNOX and AIKMAN, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BANERJI, J, RICHARDS, J, concurring :—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage. In a suit brought against the son to enforce the mortgage the onus is not on the plaintiff to prove that the debt was incurred for the benefit of the family, but it is for the son to prove that, having regard to the nature of the debt, it was not his pious duty to discharge it.

The following cases were referred to :—*Debi Dat* v. *Jadu Rai* (1), *Jamna* v. *Nain Sukh* (2), *Badri Prasad* v. *Madan Lal* (3), *Lal Singh* v. *Deo Narain Singh* (4), *Manbahal* v. *Gopal Misra* (5), *Hanuman Kamat* v. *Daulat Mundar* (6), *Ram Dayal* v. *Ajudhia Prasad* (7), *Surja Prasad* v. *Golab Chand* (8), *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (9), *Suraj Bansi Koer* v. *Sheo Parshad Singh* (10), *Babu Singh* v. *Bihari Lal* (11), *Karan Singh* v. *Bhup Singh* (12), *Girdharee Lal* v. *Kantoo Lal* (13), *Nanomi Babuasin* v. *Modhun Mohun* (14), *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (15), *Kameswar Pershad* v. *Run Bahadur Singh* (16), *Maharaj Singh* v. *Balwant Singh* (17), *Jamsetjhi N. Tata* v. *Kashinath Jivan Manglia* (18), *Chidambara Mudaliar* v. *Koothaperumal* (19), *Sami Ayyangar* v. *Ponnamal* (20),

(1) (1902) 24 All. 459.
(2) (1887) I. L. R., 9 All., 493.
(3) (1893) I. L. R., 15 All., 75.
(4) (1886) I. L. R., 8 All , 279.
(5) Weekly Notes, 1901, p. 57.
(6) (1884) I. L. R., 10 Calc., 525.
(7) (1903) I. L. R., 28 All., 328.
(8) (1900) I. L. R , 27 Calc., 762.
(9) (1905) I. L. R., 29 Mad., 200.
(10) (1878) I. L. R., 5 Calc , 148 ;
(11) (1908) I. L. R., 30 All., 156.
(12) (1904) I. L. R., 27 All., 16.
(13) (1874) L. R., 1 I. A., 321.
(14) (1885) L. R., 13 I. A., 1 ; s. c., I. L. R., 13 Calc., 21.
(15) (1856) 6 Moo. I. A., 393.
(16) (1880) I. L. R., 6 Calc., 843.
(17) (1906) I. L. R., 28 All., 508.
(18) (1901) I. L. R., 26 Bom., 326.
(19) (1903) I. L. R., 27 Mad., 326.
(20) (1897) I. L. R., 21 Mad., 28.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Luchmun Dass v. *Giridhur Choudhry* (1), *Khalil-ul-Rahman* v. *Gobind Pershad* (2), *Maheswar Dutt Tewari* v. *Kishun Singh* (3), *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (4), *Balgobind Das* v. *Narain Lal* (5), *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (6), *Madho Parshad* v. *Mehrban Singh* (7), *Beni Madho* v. *Basdeo Patak* (8), *Mahabir Pershad* v. *Moheswar Nath Sahai* (9), *Sita Ram* v. *Zalim Singh* (10), *Kishan Lal* v. *Garuruddhwaja Prasad Singh* (11), *Chail Behari Lal* v. *Gulzari Mal* (12), *Kallu* v. *Fateh* (13), *Chintamanray Mehendale* v. *Kashinath* (14), *Bhawani Bakhsh* v. *Ram Dai* (15), *Ran Singh* v. *Sobha Ram* (16), *Ramchandra* v. *Fakirappa* (17), *Ganga Prosad* v. *Ajudhia Pershad Singh* (18) and *Bhagbut Pershad Singh* v. *Girja Koer* (19).

THIS was a suit to enforce payment of a mortgage executed in 1883, by sale of the mortgaged property. The suit was brought after the death of the original mortgagor and mortgagee, who were both Hindus governed by the Mitakshara. The defendants, who were the sons and grandsons of the mortgagor, denied that the debt had been taken for the benefit of the family and that the mortgage was binding on them. The courts below found that the debt had been taken by the mortgagor who was also *karta* of the joint family, but that it was not contracted for legal necessity or pay an antecedent debt. On the other hand, it had not been alleged or proved that the debt had been taken for immoral purposes. The Court of first instance (Munsif of Jaunpur), decreed the plaintiffs' claim and this decree was on appeal confirmed by the District Judge.

The defendants appealed. The appeal was referred to the Full Bench on the recommendation of RICHARDS and KARAMAT HUSAIN, JJ.

Mr. *G. W. Dillon* (with him Munshi *Gokul Prasad*), for the appellants:—The suit ought to have been dismissed as it had not been proved that the debt was contracted for a legal necessity or to pay an antecedent debt. The pious liability of Hindu sons to pay their father's debts is not disputed. What is disputed is

(1) (1880) I. L. R., 5 Calc., 855.
(2) (1892) I. L. R., 20 Calc., 329.
(3) (1907) I. L. R., 34 Calc., 184.
(4) (1907) I. L. R., 34 Calc., 735.
(5) (1893) I. L. R., 15 All., 339.
(6) (1880) L. R., 7 I. A., 181.
(7) (1890) L. R., 17 I. A., 194.
(8) (1890) I. L. R., 12 All., 99.
(9) (1889) I. L. R., 17 Calc., 584.
(10) (1886) I. L. R., 8 All., 231.
(11) (1899) I. L. R., 21 All., 238.
(12) (1909) 6 A. L. J. R., 133.
(13) (1904) 1 A. L. J. R., 316.
(14) (1889) I. L. R., 14 Bom., 320.
(15) (1891) I. L. R., 13 All., 216.
(16) (1907) I. L. R., 29 All., 544.
(17) (1900) 2 Bom. L. R., 450.
(18) (1881) I. L. R., 8 Calc., 131.
(19) (1888) I. L. R., 15 Calc., 717.

that the father in a joint Hindu family can mortgage family property, there being no legal necessity shown for the mortgage. The limitation prescribed by law for recovery from the sons of a debt due by a Hindu father is six years. See article 120 of the Limitation Act, No. XV of 1877 and the case of *Narsing Misra* v. *Lalji Misra*, (1). If, therefore, the appellants are right in contending that a Hindu father, in the absence of legal necessity, has no power to mortgage or sell ancestral family property, any claim to recover the amount from the sons *quâ* debt is barred by limitation

For the decision of this case two principles of Hindu law require consideration. The first is that Hindu sons are under a pious liability to pay their father's debts, if not tainted with immorality. The second is that a Hindu father has no higher powers than any other member of a joint co-parcenary body. These are two distinct principles and in no way dependent upon each other. The first principle, that of the pious liability is not involved in this case and is fully admitted by the appellants. The second principle is still good law and has not been departed from in subsequent decisions. When a person under a disability creates a charge (a Hindu father is under such a disability), it is for the person enforcing a charge so created to prove that the person who created the charge was acting within his powers. In the present case, therefore, the burden lies upon the plaintiffs-mortgagees to prove that the money was borrowed for a legal necessity or to liquidate an antecedent debt. The expression "antecedent debt" nowhere occurs in the Hindu Law. The earliest cases before the Privy Council, on this branch of Hindu law, were the cases of *Girdharee Lal* v. *Kantoo Lal* (2), and *Suraj Bansi Koer* v. *Sheo Purshad Singh* (3). In those cases fathers of Hindu families had become indebted. Being pressed by their creditors they had executed mortgages of ancestral property. Suits had been brought on those mortgages, decrees obtained against the fathers, and sales had taken place in execution. After sales in execution, sons had brought suits to recover their shares in the property sold. Their lordships of the Privy Council held that "where joint ancestral property has passed out

(1) (1901) I. L. R., 23 All., 206. (2) (1874) L. R., 1 I. A., 321.
(3) (1879) L. R. 6 I. A., 88.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a father's debts, his sons by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes." In other words, they laid down that a Hindu father to liquidate his antecedent debts could mortgage and sell joint family property and that such payment came within the expression "pious purpose."

He submitted that these cases did not in any way enlarge the father's powers.

The lower courts relied on *Debi Dat* v. *Jadu Rai* (1). That case it was submitted was not rightly decided. In *Manbahal Rai* v. *Gopal Misra* (2), it was held that when a father executed a sale-deed of the family property for his own debt and not for a legal necessity or to pay off an antecedent debt, the sale was not binding on the sons. In *Kallu* v. *Fateh* (3), the same view was taken as in *Debi Dat* v. *Jadu Rai*, but the case of *Manbahal Rai* v. *Gopal Misra* was not considered. In the later case of *Ram Dial* v. *Ajudhia Prasad* (4) *Manbahal Rai* v. *Gopal Misra* was followed.

The Full Bench case, *Karan Singh* v. *Bhup Singh* (5), was not a case of mortgage but of a simple money debt. The difference is this. In the one case the father is contracting a debt, in the other he is hypothecating family property which he cannot do.

The *Mitakshara* lays down that the father in a joint Hindu family has no higher powers of alienation than any other member. (*Mitakshara*, chapter 1, section 1, verses 27, 28.) When a son claims exemption on the ground of the immoral nature of the debt, it is for him to prove the immorality, but the creditor had first to prove that a transfer was made for a legal necessity or to pay off an antecedent debt.

The case of *Nanomi Babuasin* v. *Modhun Mohun* (6), relied upon in *Debi Dat* v. *Jadu Rai* was not a case of a mortgage at

(1) (1902) I. L. R., 24 All., 459.
(2) Weekly Notes, 1901, p. 57.
(3) (1904) I. A. L. J. R., 316.
(4) (1906) I. L. R., 28 All., 328.
(5) (1904) I. L. R., 27 All., 16.
(6) (1885) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.

all but one of debt. Therefore the question could not arise in that case and the observations of their Lordships were *obiter*.

There is a conflict of opinion not only in this High Court but in the other High Courts as well. The following cases were referred to:—*Bhek Narain Singh* v. *Januk Singh* (1), *Luchmun Das* v. *Giridhur Chowdhry* (2), *Laljee Sahay* v. *Fakeer Chand* (3), *Hanuman Kamat* v. *Dowlat Mundar* (4), *Khalilul-Rahman* v. *Govind Pershad* (5), *Surja Prasad* v. *Golab Chand* (6), *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (7), *Maheswar Dutt Tewari* v. *Kishun Singh* (8), *Chintamanrav Mehendale* v *Kashinath* (9), *Jamsetji N. Tata* v. *Kashinath Jiwan* (10), *Ningareddi* v. *Lakshmana* (11), *Sami Ayyangar* v. *Ponnamal* (12), *Chidambara Mudaliar* v. *Koothaperumal* (13), *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (14), *Hanuman Singh* v. *Nanak Chand*, (15), *Jamna* v. *Nain Sukh* (16), *Badri Prasad* v. *Madan Lal* (17), *Maharaj Singh* v. *Balwant Singh* (18).

In all cases before the Privy Council from 6 I. A. onwards the suit had been brought after the property had been sold in execution of a decree.

The general principle of Hindu law is that every member of a joint Hindu family stands on an equal footing with and has the same powers as the others. The Privy Council have guarded this principle of Hindu law with great jealousy. *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (19), *Madho Parshad* v. *Mehrban Singh* (20), and *Balgovind Das* v. *Narain Lal* (21).

In the case of father and son the Privy Council safe-guarded this principle by the theory of antecedent debt and in the case of others by holding that no member can transfer even his own share without the consent of others, although at the suit of a creditor they allow such undivided share to be attached and sold.

(1) (1877) I.L.R., 2 Cal., 438
(2) (1880) I.L.R., 5 Calc., 855.
(3) (1880) I.L.R., 6 Calc., 135
(4) (1884) I.L.R., 10 Calc., 528.
(5) (1892) I.L.R., 20 Calc., 328.
(6) (1900) I.L.R., 27 Calc., 762.
(7) (1907) I.L.R., 34 Calc., 735.
(8) (1907) I.L.R., 34 Calc., 184.
(9) (1889) I.L.R., 14 Bom., 320.
(10) (1901) I.L.R., 26 Bom., 326.
(11) (1901) I.L.R., 26 Bom., 163 at pp. 168-169.
(12) (1897) I.L.R., 21 Mad., 28.
(13) (1903) I.L.R., 27 Mad., 326.
(14) (1905) I.L.R., 29 Mad., 200.
(15) (1884) I.L.R., 6 All., 193.
(16) (1887) I.L.R., 9 All., 493.
(17) (1893) I.L.R., 15 All., 75, F.B.
(18) (1906) I.L.R., 28 All., 508.
(19) (1880) L.R., 7 I.A., 181, 195.
(20) (1890) L.R., 17 I.A., 194.
(21) (1893) L.R., 20 I.A., 116.

1909

CHANDRADEO SINGH v. MATA PRASAD.

The father thus being under a legal disability to charge the share of the sons except for an antecedent debt or for legal necessity, the onus of proving that his case comes under the exception lies on the creditor who seeks to enforce the charge.

Munshi *Gokul Prasad*, on the same side, pointed out that there was no case in which the mortgagee was the plaintiff and in which the Privy Council had laid down that the burden of proof did not lie upon the plaintiff who was seeking to enforce a transfer made by a person with limited powers like the father, but that it was for the sons to prove the immoral nature of the consideration for the transfer before they could escape liability He referred to *Kameswar Pershad* v. *Run Bahadur Singh* (1).

Mr. *M. L. Agarwala* (for Mr *W. Wallach*), for the respondent. The question whether an alienation by a father can be upheld when no antecedent debt or necessity is proved and the consideration is not immoral, is one of interpretation of certain *dicta* of the Privy Council. So far as the *shastras* are concerned, not a word is found in them about antecedent debts. The only ground on which the son is made liable to pay his father's debts is his pious duty to save the soul of his father from going into the regions of torment and this duty is as great in the case of a present debt as in that of an antecedent debt. According to the rulings also an 'antecedent debt' may mean a present debt. *Luchmun Das* v. *Giridhur Chowdhry* (2), *Khalil-ul Rahman* v. *Govind Pershad* (3), *Maheswar Dutt Tewari* v. *Kishun Singh* (4). This view was also held by the Madras High Court in *Chidambara Mudaliar* v. *Koothaperumal* (5). In *Venkataramanayya Pantulu* v. *Venkataramana Doss Pantulu* (6), the Judges adopt the principle laid down in 27 Mad., 326. There is practically no distinction between a present advance and an antecedent debt. J. C. Ghose, *Hindu Law*, second edition, 445.

On the question of the *onus* of proof, the rulings of the Bombay High Court in *Chintamanrav Mahendale* v. *Kashinath* (7),

(1) (1880) I. L. R., 6 Calc., 843, 847, P. C.
(2) (1880) I. L. R., 5 Calc., 855.
(3) (1894) I. L. R., 20 Cal., 328.
(4) (1907) I. L. R., 34 Calc., 184.
(5) (1903) I. L. R., 27 Mad., 326.
(6) (1905) I. L. R., 29 Mad., 200.
(7) (1889) I.L.R., 14 Bom., 320.

Ramchandra Mahadev Nadgir v. *Fakirappa* (1), and *Govindkrishna Gujar* v. *Sakharam Narayan* (2) were referred to.

The rulings of the Allahabad High Court also have been, except for two decisions and an *obiter dictum*, uniformly in favour of the creditor, irrespective of the fact whether he comes as a plaintiff or as a defendant. *Sita Ram* v. *Zalim Singh* (3), *Kishan Lal* v. *Garuruddhwaja* (4), *Debi Dat* v. *Jadu Rai* (5), *Kallu* v. *Fateh* (6), and *Babu Singh* v. *Behari Lal* (7). The only direct ruling against the respondent is, *Jamna* v. *Nain Sukh* (8). In this case it was held that the *onus* of proving legal necessity lay upon the creditor. This case was decided on the strength of *Lal Singh* v. *Deo Narain Singh* (9). But the judgment in that case was disavowed in a later case, *Bhawani Bakhsh* v. *Ram Dai* (10), by the judges who delivered the former judgment. Therefore the judgment in 9 All., 493, being based on 8 All., 279, is, it was submitted, incorrect.

In *Manbahal Rai* v. *Gopal Misra* (11), the remarks made with regard to antecedent debts were not necessary for the decision of the case. There is a passage in *Karan Singh* v. *Bhup Singh* (12), which taken by itself is in favour of the respondent. The passage includes mortgage debts as well as simple money debts.

As to *Maharaj Singh* v. *Balwant Singh* (13), the remarks in it as to the burden of proof being on the creditor were not necessary for the decision of the case. The immoral nature of the debt was proved in this case and the question did not, therefore, arise at all as to whether the burden of proving legal necessity lay on the creditor: *Basa Mal* v. *Maharaj Singh* (14), *Beni Madho* v. *Basdeo Pathak* (15), *Bhawani Bakhsh* v. *Ram Dai* (16), *Pem Singh* v. *Partab Singh* (17), and *Lal Singh* v. *Pulandar Singh* (18), were referred to and it was urged that

(1) (1900) 2 Bom., L.R., 450.
(2) (1904) I.L.R., 28 Bom., 383, 389.
(3) (1886) I.L.R., 8 All., 233.
(4) (1899) I.L.R., 21 All., 238.
(5) (1902) I.L.R., 24 All., 459.
(6) (1904) I.A.L.J R., 316.
(7) (1908) 5 A.L.J.R., 175.
(8) (1887) I.L.R., 9 All., 493.
(9) (1886) I. L. R., 8 All, 279.
(10) (1891) I. L. R., 13 All, 216.
(11) Weekly Notes 1901, p. 57.
(12) (1904) I.L.R., 27 All., 16, 18.
(13) (1906) I. L. R., 28 All., 508.
(14) (1886) I. L. R., 8 All. 205.
(15) (1890) I. L. R., 12 All., 99.
(16) (1891) I. L. R., 13 All., 316.
(17) (1892) I. L. R., 14 All., 179.
(18) (1905) I. L. R., 28 All., 182.

1909

CHANDRADEO SINGH v. MATA PRASAD.

in *Girdharee Lal* v. *Kantoo Lal* (1), their Lordships of the Privy Council were in doubt as to whether sons could question alienations made by the father, except on the ground of immorality, but in the later case of *Nanomi Babuasin* v. *Modhun Mohun* (2), their Lordships held that sons could not set up their right against the remedies of the creditor. This High Court has made observations on this ruling favourable to the creditor in *Lachman Das* v. *Khunnu Lal* (3) and *Karan Singh* v. *Bhup Singh* (4). The Privy Council clearly lay down in 13 Calc., 21, that a creditor can pursue any remedies open to him against the son which he could have pursued against the father unless the debt is tainted with immorality. This view has been followed in *Bhagbut Pershad Singh* v. *Girja Koer* (5) and *Mahabir Pershad* v. *Maheswar Nath Sahai* (6).

It was submitted that from 1836 to 1908 there was a uniformity of decisions in this High Court that the *onus* lay on the son. The principle of *stare decisis* should not be departed from.

Munshi *Gokul Prasad*, in reply referred to the principle of Hindu law that no member of a joint Hindu family can alienate family property without necessity. *Balgobind Das* v. *Narain Lal* (7). *Mitakshara*, Chapter I, section 1, verses 27, 28. The power of the father is not greater than that of any other member except that he is the natural manager of the family and that sons have a pious duty to pay the debts of their father. The reason why the father is unable to transfer family property is given by the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (8).

The power of the father to alienate family property should not be confused with the liabilities of the sons to pay their father's debts. The Privy Council have applied two different rules of evidence to the two classes of cases, *viz.*, those in which a creditor sues to enforce a charge against joint family property created by a Hindu father who has only a limited power of disposal, and those in which the sons come in as *plaintiffs* to set aside sales in execution of decrees obtained against the father.

(1) (1874) L. R., 1 I. A., 321.
(2) (1885) I. L. R., 13 Calc., 21, P. C.
(3) (1896) I. L. R., 19 All., 26, 31, F. B.
(4) (1904) I. L. R., 37 All., 16, 18, F. B.
(5) (1888) I. L. R., 15 Calc., 17, P. C.
(6) (1889) I. L. R., 17 Calc., 584, P. C.
(7) (1893) I. L. R., 15 All., 339, P. C.
(8) (1888) I. L. R., 10 All., 272, 286.

In the *former class of cases* they have applied the general rule that a plaintiff seeking to enforce a charge created by a person with limited powers must show that under the circumstances that person was competent to charge the property. This general rule is laid down in the well-known case of *Hanoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1). The same rule has been applied to cases of transfers by a father where in derogation of the rights of his son, under the *Mitakshara*, he has made an alienation of the family property. *Kameshwar Pershad* v. *Run Bahadur Singh* (2). In the latter class of cases they have applied the rule that when the sons sue to recover property which has passed out of the family by sale in execution of a decree obtained against the father, they must prove that the sale took place under such circumstances that they were not bound by it. The Privy Council *case in* I. L. R., *13 Calc*, *21, is a case of that* kind. In *Nanomi Babuasin* v. *Modhun Mohun* (3) the Privy Council never said that the sons could not plead limitation; what they said was that sons could not set up their right against the remedies of the creditor, but that implies that there must be in existence some remedies open to the creditor and not barred by time.

As regards the meaning of the phrase 'antecedent debt' it has been held by this court that antecedent debt means a debt contracted before the sale or the mortgage sought to be set aside by the son, and other courts have, in many cases, expressed the same view. The cases of *Lal Singh* v. *Deo Narain Singh* (4), *Manbahal Rai* v. *Gopal Misra* (5), *Ram Dayal* v. *Ajudhia Prasad* (6), *Hanuman Kamat* v. *Daulat Mundar* (7), *Surju Prasad* v. *Gulab Chand* (8), *Chinnayya* v. *Perumal* (9), *Sami Ayyangar* v. *Ponnammal* (10), and *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (11) were referred to.

The following judgments were delivered:

STANLEY, C.J.—This second appeal was directed to be laid before a Full Bench in consequence of a conflict in the decisions

(1) (1856) 6 Moo. I. A., 393, 418-9.
(2) (1880) I. L. R, 6 Calc, 843, 847-8.
(3) (1885) I. L. R., 13 Calc., 21.
(4) (1886) I. L. R., 8 All., 279.
(5) (1901) A. W. N., 57.
(6) (1905) I. L. R, 28 All., 328.
(7) (1884) I. L. R., 10 Calc., 528.
(8) (1900) I. L. R, 27 Calc., 762.
(9) (1889) I. L. R., 13 Mad., 51.
(10) (1897) I. L. R., 21 Mad., 28.
(11) (1905) I. L. R., 29 Mad., 200.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C. J.

of this and the other High Courts upon the main question involved in it. The suit is one to enforce payment of a mortgage by sale of the mortgaged property. The mortgage was executed by the late Ram Narain Singh, who was the head of the defendants' family on the 4th of September 1883 to secure a principal sum of Rs. 400 in favour of Ram Narain Kalwar, the father of the plaintiff respondent Sheo Babu Singh and the grandfather of the appellant Chanderdéo Singh. The parties are governed by the law of the Mitakshara. It was found by the Court of first instance that the mortgage was not executed for the purpose of satisfying any antecedent debt and there was no evidence that the consideration was required for the legal necessities of the family, or that the lender made any inquiry as to the purposes for which the money was borrowed. On the other hand it was not proved, or even alleged, that the debt was tainted with immorality. On these findings the court mainly relying on the decision in the case of *Debi Dat* v. *Jadu Rai* (1), decreed the plaintiffs' claim. Upon appeal this decision was upheld by the learned officiating District Judge. He held that the money advanced to the mortgagor could not be said to have been applied to the discharge of any antecedent debt, but at the same time that the debt was not tainted with immorality and consequently the appeal was without any force. A second appeal was preferred, the first ground of appeal being that the mortgage not being one for the payment of an antecedent debt, nor for family necessity, was not binding on the appellants. There is a second ground of appeal, namely, that the claim of the plaintiffs so far as it is based on the poius duty of sons to pay their fathers' debt is barred by time. In view of the pious obligation of Hindu sons in a Mitakshara family to pay their father's debts, the learned counsel for the appellants did not for a moment contend that this pious duty did not lie upon his clients. He admitted that they were so liable, but he contended that the mortgage of the 4th of September 1883, not having been made to satisfy an antecedent debt, or for family necessities, was not binding upon the

(1) (1902) I. L. R., 24 All., 459.

1909

CHANDRADEO SINGH v. MATA-PRASAD.

Stanley, C. J.

appellants. The sole question then for the court is whether a father of a Hindu family governed by the Mitakshara law, can execute a mortgage which will be binding upon his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

The rule of the Mitakshara is to be found in Chapter I, section 1, clause 27. Clause 27 runs as follows:—Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father, or other predecessor; since it is ordained though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten and they who are yet still in the womb require the means of support, no gift or sale should therefore be made," and then follows in clause 28 an exception to this rule. It runs as follows:—"Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress for the sake of the family, and especially for pious purposes." This means, I take it that a donation, mortgage or sale cannot be made except for the purposes named or one of them. This is the foundation of all the decisions governing the competency of a Hindu father in a family governed by the Mitakshara to dispose of the joint property of the family. He can dispose of it during a season of distress, for the sake of the family or for pious purpose.

Until recently the decision of this High Court in the case of *Jamna* v. *Nain Sukh* (1) was regarded as a binding ruling. In that case Sir John Edge, C. J., and Mahmood, J, held that as a general rule a creditor endeavouring to enforce his claim under an hypothecation bond given by a Hindu father against the estate of

(1) (1887) I. L. R. 9 All., 493.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

a joint Hindu family in respect of money lent or advanced to the father, should prove either that the money was obtained by the father for a legal necessity, or that he (the creditor) made such responsible enquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family. In that case in a suit against the members of a joint Hindu family upon a bond given by their father by which family property was hypothecated no evidence was given on either side, as here, as to the circumstances under which the bond was given. It was held that the burden of proof lay upon the plaintiff to show that either the money was obtained for legal necessity or that he had made reasonable inquiries and had obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family.

In the case of *Badri Prasad* v. *Madan Lal* (1), a Full Bench of this Court consisting of all the Judges held that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the birth of the sons, which purported to mortgage the joint family property, *the consideration having been money advances antecedently made* by the mortgagee to the father, not as manager of the family, or with the authority of the sons, or for family purposes, but not for purposes of immorality or for purposes which if the father were dead would exonerate the sons from the pious obligation of paying such debts of the father. In this case, as appears from the judgment of Edge, C. J., the consideration for the bond in suit was a sum of Rs. 1,457-3-0 due under a prior bond of the 7th of October 1881, Rs. 181-4-0 interest due under this bond and a present advance of Rs. 11-9-0. The money was borrowed to pay off an antecedent debt. The present advance of Rs. 11-9-0 being regarded as a negligible quantity. The decision therefore gives no support to the contention of the respondents.

In the case of *Manbahal Rai* v. *Gopal Misra* (2) Sir Arthur Strachey, C.J., and my brother Banerji expressed the view that a sale of ancestral property by a father in a joint Hindu family

(1) (1893) I. L. R., 15 All., 75. (2) Weekly Notes 1901, p. 57.

may be set aside on suit by the sons so far as it affected their interest in the property if there were no *antecedent debt* or valid necessity to support it, although the transaction was not shown to be tainted with immorality. In his judgment Sir Arthur Strachey, C J., commenting upon the view expressed by the learned Judge of this Court from whose decision the appeal had been preferred observed as follows:—"The learned Judge held that the plaintiff was entitled to no relief whatever, inasmuch as he was "a Hindu son impeaching the sale of ancestral property of a joint family made by his father" and it had been "constantly held that when the vendor is the father in a joint family the son can impeach the sale only on the ground that the money was raised for debauchery and other immoral purposes." In my opinion that proposition is too broadly laid down by the learned Judge. The doctrine limiting the son's power to impeach an alienation of joint family property made by his father is based solely on the pious duty which the Hindu law recognises as incumbent upon a son to pay his father's debts not tainted with immorality. The true rule is that the son cannot impeach an alienation of ancestral joint family property made by a father, *for which the consideration is an antecedent debt of the father* not tainted with immorality or the object of which is to pay *such* a debt. That this is the true scope of the doctrine is shown by the numerous decisions, of which it is sufficient to refer to *Lal Singh* v. *Deo Narain Singh* (1) the decisions of the Privy Council cited in the judgment in that case, and the judgment of the Full Bench in *Badri Prasad* v. *Madan Lal* (2). These cases show that the *doctrine has no application to a case in which no antecedent debt of the father, that is a debt antecedent to the alienation in question is concerned as* the consideration or object of the alienation. In the present case the deed *does not state* any antecedent debt of the father as the consideration or the object of the sale." (The italics are mine.) Nothing can be clearer than this language of the learned Chief Justice. In his judgment my brother Banerji endorsed the view expressed by Sir Arthur Strachey in the following language:—"According to the well known rulings of the Privy Council,

(1) (1886) I. L. R., 8 All., 279. (2) (1893) I. L. R., 15 All., 75.

1909.

CHANDRADEO SINGH
v.
MATA PRASAD.

Stanley, C. J.

an alienation of joint family property made by the father of a joint Mitakshara family cannot be impeached by his sons, if such alienation has been made in lieu of an antecedent debt or for the payment of the father's debt, unless the son can prove that the debt was incurred for an immoral purpose, the reason for the rule being that it is the pious duty of the son to pay his father's debt not tainted with immorality. Had the transaction in the present case been that of a sale made in lieu of an antecedent debt, or for the payment of a debt due by the father, the principle which the learned Judge of this Court has applied would have been applicable. But in this case there was no allegation that the consideration for the sale was an antecedent debt of the father or that it was taken for the purpose of paying off the father's debt." Now in that case it was found that there was no consideration at all for the sale. Consequently the suit was bound to succeed; but I cite the case as showing the view of the law which was entertained at this time by the learned Judges who decided it. This was the case of a sale, but it is obvious that no distinction can be drawn between alienation by out and out sale and alienation by mortgage. A mortgage is a *sale sub modo*. The word 'alienation' frequently met with in the text books and judgments embraces both sale and mortgage.

In the case of *Ram Dayal* v. *Ajudhia Prasad* (1) my late brother Burkitt and myself adopted the view of the law expressed in *Manbahal* v. *Gopal Misra*.

Now by the expression antecedent debt I understand a debt which is not for the first time incurred at the time of a sale or mortgage that is presently incurred but a debt which existed prior to and independently of such sale or mortgage. It must be a *bona fide* debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object. This was the interpretation placed upon the expression by the Calcutta High Court in the case of *Hanuman Kamat* v. *Dowlut Mundar* (2), in which it was held that although no member of a joint Hindu family governed by the Mitakshara or Mithila law has the authority, without the consent of his co-sharers, to sell or mortgage even his own share

(1) (1906) I. L. R., 28, All., 328. (2) (1884) I. L. R., 10 Calc., 528.

in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of his own and his sons in order to pay off antecedent personal debts, the sons cannot avoid such alienation unless they prove that the debts were immoral; that to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not merely in consideration of a loan or a payment made to the father on the occasion of his making the alienation; and that in the case of a voluntary sale the purchase money does not constitute an antecedent debt such as to render that sale binding on the sons unless they prove the transaction to have been immoral.

Again in the same High Court in the case of *Surja Prasad* v. *Golab Chand* (1) Ghose and Harington, JJ., held that in a case of a joint Mitakshara family where the father raised money on a mortgage hypothecating ancestral family property and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgage as to the purpose for which the debt was incurred, the mortgage security could not be enforced against the son (the father having died) unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question and that under the circumstances the mortgage was not binding upon the son, but that the debt not having been proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money decree against the sons, not upon the mortgage security, but upon the simple obligation created by the bond, and that a suit for such a relief must, under the Limitation Act, be instituted within six years from the date of the mortgage bond.

In the Madras High Court in the case of *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (2) Sir Arnold White, C. J., and Subramania Ayyar and Davis, JJ., held, following several decisions of that High Court, that when a debt was incurred at the time of sale or mortgage, it was not an

(1) (1900) I. L. R., 27 Calc., 762. (2) (1905) I. L. R. 29 Mad. 200.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C.J.

antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). In their judgment the learned Judges observe :—"As regards the question of sale there does not appear to be any decision, either of the Privy Council or of the Courts of this country, that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to and independently of the sale." I think it to be beyond question that the expression "antecedent debt" means what it expresses, namely a debt incurred prior to and independent of the sale or mortgage sought to be enforced.

The propriety of the decision in the case of *Jamna* v. *Nain Sukh* (2) was questioned in the two cases of *Debi Dat* v. *Jadu Rai* (3) and *Babu Singh* v. *Bihari Lal* (4). In the first mentioned case my brother Banerji seems to me to have resiled from the view laid down by him in *Manbahal Rai* v. *Gopal Misra*. He and my brother Aikman held in a suit for sale on a mortgage of joint family property executed by a father and three of his sons that the fourth son, who was a minor and four grandsons, also minors who were not executants of the mortgage, were properly arraigned as defendants, inasmuch as their own interests in the joint family property would be liable under the mortgage unless they could show that either the mortgage debt was never incurred or that it no longer subsisted or that it was tainted with immorality. The learned Judges delivered a very short judgment holding that the ruling in the case of *Jamna* v. *Nain Sukh* was overruled by their lordships of the Privy Council. They say :—"It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in *Badri Prasad* v. *Madan Lal*, and to the ruling of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*, it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred, or is no longer in existence or that it was tainted with immorality. I may here again point out that in the case of *Badri*

(1) (1878) I. L. R., 5 Calc., 148.
(2) (1887) I. L. R., 9 All., 493.
(3) (1902) I. L. R., 24 All., 459.
(4) (1908) I. L. R., 30 All., 156.

Prasad v. *Madan Lal*, the consideration for the mortgage which formed the basis of the suit was with a trifling exception money advances antecedently made by the mortgagee to the father.

In the case of *Babu Singh* v. *Bihari Lal* (1), which was a suit for sale upon a mortgage my brothers Banerji and Richards held that the decision in the case of *Jamna* v. *Nain Sukh*, could no longer be supported and that it was sufficient in order to establish the liability of a son to pay the personal debt of his father, if the debt be proved and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. In that case my learned brothers quoted with approval my words in the Full Bench case of *Karan Singh* v. *Bhup Singh* (2), as follows:—"It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes, or was such a debt as does not fall within the pious duty of the sons to discharge." Now the suit of *Karan Singh* v. *Bhup Singh* was not a suit to enforce payment of a mortgage debt. It was a case in which a creditor obtained a decree for profits against the lambardar of a village and in execution of that decree attached immovable property belonging to a joint family of which Tota Ram, the lambardar, was the head. The sons and grandsons of the lambardar were the plaintiffs in the suit, and in it they sought a declaration that their interests in the property attached were not liable to attachment and sale in execution of the decree against their father. As pointed out in the judgment there was no allegation that the debt in respect of which the execution proceedings were had was for immoral purposes or such a debt as the sons and grandsons were relieved from their pious obligation to satisfy. This being so, and the sons being liable to satisfy the debt the joint family property was liable to attachment and sale in execution of the decree. The claim was in fact enforced against the sons by reason of their pious obligation to pay their father's debts. My brothers Banerji

(1) (1908) I. L. R., 30 All., 156. (2) (1904) I. L. R., 27 All. 16

and Richards seem not to recognize any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father's debts, and a case in which a mortgagee of the father seeks to enforce a mortgage against the son by sale of the mortgaged property.

In the case before us, as I have said, it is not denied that sons in a Mitakshara family are liable to pay their father's debts, provided those debts be not tainted with immorality. What is denied is that a mortgage by a father in such a family is binding upon his sons if that mortgage had not been executed to satisfy an antecedent debt or a family necessity and the mortgagee has failed to show that he made any reasonable inquiry as to the necessity for the loan. A son admittedly may be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father's debts provided that the suit be not barred by limitation and a decree passed in such a suit may be enforced in execution by sale of the ancestral property of the family.

Now let me turn to the decisions of their Lordships of the Privy Council which have been relied upon as supporting the view that a mortgage executed by a Hindu father, in a Mitakshara family not shown to have been made to satisfy an antecedent debt or a family necessity but not shown to have been for a debt tainted with immorality, is binding upon his sons. The first to which I shall refer is the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). In that case an *ex parte* decree for money had been obtained against a Hindu governed by the Mitakshara Law upon a bond, whereby he had mortgaged his ancestral immovable estate and the estate was attached and sold. Prior to the sale in execution the judgment debtor died and his infant sons and co-heirs on filing a petition of objections, were referred to a regular suit. They instituted a suit *after the sale* against the execution creditor and the purchasers for a declaration of their right to the property sold and to have the mortgage bond, the *ex parte* decree and the execution sale set aside. It appeared that the father's debt had been incurred without justifying necessity and it was held that as between the infants and

(1) (1878) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88.

the execution creditor neither they nor the ancestral immovable property in their hands was liable for the father's debt, but that as regards the judgment debtor's undivided share in the estate sold whether or not his own alienation was valid by the law as understood in Bengal it was capable of being seized in execution and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceeding having at the time of the judgment debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale. It will be observed that as between the infants and the execution creditor neither they nor the ancestral property in their hands were held to be liable for the debt. In delivering the judgment of their Lordships Sir James W. Colvile remarked that "the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered) and the fact that the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether in order to bind adult coparceners, their express consent is not required." His Lordship then referring to the case of *Girdharee Lall* v. *Kantoo Lall*(1) observed :—"This case is undoubtedly an authority for these propositions. First, that where joint ancestral

(1) (1874) L. R., 1 I. A., 321.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

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(1) (1878) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88.

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(1) (1874) L. R., 1 I. A., 321.

property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off antecedent debt, or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and *secondly* that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

The first of these propositions it will be observed deals with cases where joint ancestral property has passed out of a joint family either under a conveyance executed by a father *in consideration of an antecedent debt or* in order to raise money to pay off *an antecedent debt, or under* a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases and the words antecedent debt, seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons.

The next case to which I would refer is that of *Mussumat Nanomi Babuasin* v. *Modhun Mohun* (1). In that case the suit was instituted by the widow of a Hindu on behalf of her minor sons and herself *to set aside a sale* made in execution of a personal decree obtained against the father and husband, at which the defendant had become the purchaser and had as such obtained possession not only of the father's interest but also that of his sons. In this case, it will be observed, the ancestral property had passed out of the joint family under a sale in execution of a decree for the father's debt and therefore it fell within the propositions laid down in Suraj Bansi Koer's case. In delivering the judgment of their Lordships Lord Hobhouse made the following pronouncement :— "There is no question that considerable difficulty has been found in giving full effect to each of two principles

(1) (1885) I. L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.

of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable for the father's debts and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

This pregnant statement of his Lordship has created much misconception, and it is upon the meaning intended to be conveyed by his Lordship that the Judges in the various courts in India have differed. On the one hand it has been held that this dictum is an authority for the proposition that a Hindu father in a joint Mitakshara family can give a valid mortgage of the joint ancestral property as security for an advance made to him at the time not to satisfy an antecedent debt or a family necessity but not made for an immoral purpose. On the other hand the view taken by other Judges is that this interpretation is too wide and that a mortgage to be valid must have an antecedent debt or some family necessity to support it or at least the mortgagee must after reasonable inquiry have satisfied himself as to the existence of an antecedent debt or a family necessity for the loan.

In the leading case of *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1), in which the powers of a

(1) (1856) 6 Moo. I. A., 393

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

manager for an infant heir to charge ancestral property by loan or mortgage were dealt with, the question was considered as to the party upon whom the onus of proof lay to prove that the alienation of a manager was *bona fide*. Their Lordships remark that the question on whom such *onus* lay was not capable of a general and inflexible answer, and then they observe (at page 419 of the report):—"Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan," and they later on observe as follows:—"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." Their Lordships were dealing in this case with the powers of the manager of an Hindu family, but the rule laid down by them is equally applicable to transactions in which a father in derogation of the rights of his sons under the Mitakshara law has made an alienation of ancestral family estate.

In the case of *Kameswar Pershad* v. *Run Bahadur Singh*, (1) it was held by their Lordships that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate, was bound at least to show the nature of the transaction and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities; that the principle was that the lender, although he is not bound to see to the application of

(1) (1880) I. L. R., 6 Calc., 843 847

the money and does not lose his rights if upon *bonâ fide* enquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things, namely, to inquire into the necessity for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the borrower is acting in this particular instance for the benefit of the estate. Their Lordships referred to the principles laid down in the case *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* and observed :—" They have applied those principles in recent cases not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely alienations by a widow, and to *transactions in which a father in derogation of the rights of his son under the Mitakshara law, has made an alienation of the ancestral family estate.* (The italics are mine) The principle broadly laid down is that, although the lender is not bound to see to the application of the money, and does not lose his rights if upon a *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things, and then their Lordships specify what was required of the creditor in the case to which we have referred. This decision is in consonance with the provisions of section 38 of the Transfer of Property Act which are quoted in the Bombay case to which I shall presently refer. Their Lordships, it will be observed, did not in the case of *Nanomi Babuasin* v. *Modhun Mohun* profess to state any principle of law which had not been previously enunciated. The question determined in it was whether the entirety of a family estate, including the shares of minor sons had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit nor in the execution proceedings.

The case of *Jamna* v. *Nain Sukh* is on all fours with the case before us. The learned Judges who decided it drew a distinction between it and cases in which a decree had been obtained against the father and the joint property sold or cases in which the sons come into Court to ask for relief against a sale effected by their

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

father for an antecedent debt. Is it the case then that this ruling can no longer be considered as law in view of the ruling in *Nanomi Babuasin* v. *Modhun Mohun*? It will be noticed from the judgment that the learned Judges who decided it had in view and considered the rulings of their Lordships of the Privy Council.

Let us see now what has been the trend of the rulings of this and other High Courts upon the question before us since the decisions of the Privy Council in the cases to which I have referred. I have already mentioned the cases of *Debi Dat* v. *Jadu Rai* (1), and *Babu Singh* v. *Bihari Lal* (2). In the case of *Ram Dayal* v. *Ajudhia Prasad* (3), my late brother Sir William Burkitt and myself, adopting, as I have said, the view of the law expressed in *Manbahal Rai* v. *Gopal Misra*, held that a sale of ancestral property by a father in a joint Hindu family might be set aside on a suit by the sons, so far as it affected their interests, if there was no antecedent debt or valid necessity to support the sale, although the transaction might not be shown to be tainted with immorality. In *Maharaj Singh* v. *Balwant Singh* (4) the question now before us was discussed in the judgment of myself and Sir William Burkitt and the authorities were referred to. It was not necessary in that case to determine the point which is for determination in this appeal but an expression of our view of the law is to be found at page 541.

In the case of *Jamsetji N. Tota* v. *Kashinath Jivan Manglia* (5), the facts were these. By a written agreement of the 9th of March 1900, the first two defendants, a mother and a son contracted to sell to the plaintiff certain ancestral property. The plaintiff discovered that the first defendant had a minor son and he instituted a suit against the first and second defendants and the minor son for specific performance of the agreement, contending that the minor's interest was bound inasmuch as the property was sold in order to pay family debts. It was held that no decree could be made against the minor defendant; that in order to satisfy such of his debts as would be binding on his

(1) (1902) I. L. R., 24 All., 459.
(2) (1908) I. L. R., 30 All., 156.
(3) (1905) I. L. R., 23 All., 328.
(4) (1906) I. L. R., 28 All., 508.
(5) (1901) I. L. R., 26 Bom., 326.

heirs a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, but in the case before the Court there was no evidence of debts which justified the sale, and that it lies on the party who seeks to bind an infant to prove justifying circumstances and this the plaintiff had failed to do. The case came before Sir Lawrence Jenkins, C. J., and Starling J., on appeal from Russell, J. The learned Chief Justice in delivering the judgment observed as follows:—"The cases have now established that to satisfy such of his debts as would be binding on his son a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, while section 38 (in error described as section 34) of the Transfer of Property Act provides that 'where any person authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall as between the transferee on the one part and other persons (if any) affected by the transaction on the other part, be deemed to have existed if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith." The learned Chief Justice then remarks:—"This statutory provision is substantially a statement of the principle deducible from the cases on this point. But this principle obviously has no application where the transaction is still incomplete; for it presupposes an actual transfer for consideration. Here there has been no transfer, nor has the consideration for the transfer been performed. Therefore the declaration sought in this suit against the infant defendant must be supported on some other basis. But the only basis suggested is the analogy of this very rule; for it is argued that as the completed transaction would have been supported and sanctioned against the infant son, so ought the incomplete transaction to be enforced against him. True, there is a superficial resemblance between the two positions, yet it is but superficial: the essential basis of the rule is absent. The duty to discharge the father's debts justifies the acquisition of the money required for that purpose even though it be by sale of the ancestral immovable land. But the existence or a reasonable belief by the purchaser

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley C.J.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C. J.

in the existence of those debts is a necessary condition. Now it is quite clear that the plaintiff's agents by whom alone the negotiations were conducted made no inquiry as to the existence of justifying debts." Then later on he observes:—"We therefore, have to see whether there are now debts that call for or at any rate justify the conversion of the ancestral immovable property into money. On the evidence before us I am not satisfied of this, and it follows as a necessary consequence that in my opinion the declaration should not be made." This ruling supports the appellant's contention.

The ruling of Boddam and Bhashyam Ayyangar, JJ., in the case of *Chidambara Mudaliar* v. *Koothaperumal* (1) on the other hand supports the respondent's contention but it was overruled by the Full Bench of the Madras High Court in the case of *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (2). In the first mentioned case it was held that a debt incurred by a Hindu father, which was not shown to be illegal or immoral, was, even during the lifetime of the father, binding on the son's interest in the family property, and that in the case of a mortgage debt incurred by the father, the mortgage was binding on the son, notwithstanding that there was no debt anterior to the mortgage but only the debt incurred at the same time as the mortgage, the mortgage being executed as security therefor. The learned Judges observed that "on principle it is difficult to make any distinction between mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son for his share in the mortgaged property can as a general rule be seized and brought to sale, even in the latter case for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage) unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment." This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the

(1) (1903) I. L. R., 27 Mad., 326. (2) (1905) I. L. R., 29 Mad., 200.

creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this province is well known. Money lenders are ever ready to advance money to thriftless or extravagant land owners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. Money lenders are chary of making large advances to landowners on personal security. Now if in negotiations for a loan on a mortgage lenders are obliged to make inquiry and satisfy themselves that the loan is required to meet a legal necessity this will afford some protection to the other members the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection. A father of extravagant habits might on the security of the ancestral property borrow large sums to satisfy extravagant fancies. He might emulate the folly of the eccentric king of whom we have lately read, who expended the treasure of his kingdom in building a castle on airy heights, and so strip his posterity of their ancestral possessions. The question is not one of mere academic interest but one of substance. The decision in *Chidambara Mudaliar* v. *Koothaperumal* was overruled, as I have said, by Sir Arnold White, C. J., and Justices Subramania Ayyar and Davies in the latter case which I have already cited, in which it was held, following the earlier decision in *Sami Ayyangar* v. *Ponnammal* (1) that a sale or mortgage of joint family property by a father is binding on

(1) (1897) I. L. R., 21 Mad., 28.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C. J.

the son's share only *when there is an antecedent debt* that is a debt existing prior to and independently of the sale or mortgage. In the course of their judgment the learned Judges remark that "there does not appear to be any decision either of the Privy Council or of the Courts of this country that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to, and independently of the sale." This is a direct authority in support of the contention advanced by the appellants.

Of the cases in the Calcutta High Court the first to which I shall refer is that of *Luchmun Dass* v. *Giridhur Chowdhry* (1), which came before a Full Bench consisting of Sir Richard Garth, C.J., and Jackson, Pontifix, Morris, and Mitter, JJ. In that case the manager of a joint Mitakshara family consisting of a father and a minor son, raised money on the mortgage of family property. It was not proved on the one hand that there was legal necessity for raising the loan, nor on the other that the money was raised or expended for immoral purposes or that the lender inquired as to the purposes for which the money was required. It was held, amongst other things, that the mortgage itself, upon which the money was raised could not be enforced, but the debt contracted by the father being itself an antecedent debt within the rules of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole of the ancestral estate inclusive of the mortgaged property. This is an important decision which supports the view contended for by the appellants.

I next come to the case of *Surja Prasad* v. *Golab Chand* (2). In that case a father in a joint Mitakshara family raised money on a mortgage hypothecating ancestral property and it was not proved that the money was required for payment of any antecedent debt, or that the money was raised or expended for illegal or immoral purposes or that any inquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred. The facts are on all fours with those in the case before us. It was there contended that in view of the later

(1) (1880) I.L.R., 5 Calc., 855. (2) (1900) I.L.R., 27 Calc., 762.

decisions of the Privy Council a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception, and that there was no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons, that the sons are bound to pay all debts whether secured or unsecured provided they were not incurred for illegal or immoral purposes. On the other side the argument was that the bond could only be enforced against the sons as a simple money bond if a suit were instituted within six years from the due date of the bond and that as the suit was instituted after the expiry of six years from the due date, it was barred by limitation. Ghose, J., (now Sir Chunder Madhub Ghose) an eminent authority on Hindu Law, and Harington, J., held that the mortgage was not binding on the sons, but that the debt not having been proved to have been incurred for illegal or immoral purposes the mortgagee would be entitled to money decree against the defendants, not upon the mortgage security but upon the simple obligation created by the bond, and that a suit for such a relief must under the Limitation Act be instituted within six years from the due date of the bond. The decision in *Luchmun Dass* v. *Giridhur Chowdhry*, to which I have referred, and also in *Khalilul Rahman* v. *Gobind Pershad* (1) were relied on.

In the later case of *Maheswar Dutt Tewari* v. *Kishun Singh* (2) Brett and Sharfuddin, JJ., dissenting from the decision in *Luchmun Dass* v. *Giridhur Chowdhry* and *Surja Prasad* v. *Golab Chand*, held that a mortgage by a father in a joint Mitakshara family, composed of father and sons on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the sons and that the limitation applicable to a suit on the bond against the sons as well as the father was that provided by article 132, schedule II of the Limitation Act. The learned Judges decided this case on the assumption that the law as laid down in the case of *Luchmun Dass* v. *Giridhur Chowdhry* could not be held to be any longer binding in view of the later decisions of the Privy Council.

The same question came before another Bench of the Calcutta High Court, consisting of Mookerjee and Holmwood, JJ., in the

(1) (1892) I.L.R., 20 Calc., 328. (2) (1907) I.L.R., 34 Calc., 184.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C J.

case of *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1). In that case a father in a joint Mitakshara family consisting of a father and his minor son, mortgaged property belonging to the joint family. It was not proved that there was any legal necessity for the loan, or any inquiry by the lender, nor that the loan was contracted for illegal or immoral purposes. It was held in a suit by the mortgagee to enforce his security that he was entitled to have the security enforced as against the share of the mortgagor and also to a decree which would enable him to realize the debt by the sale of the share of the son in the ancestral property. The learned Judges held that the decision in *Luchmun Dass* v. *Giridhur Chowdhry* had not been overruled by the Privy Council and was binding upon them and pointed out the distinction existing between the position of a son in a suit in which the mortgage by his father is sought to be enforced against his share in the property and his position after the alienation has been completed by an execution sale. They dealt with the question at considerable length and pointed out that the Judges who decided the case of *Maheswar Dutt Tewari* v. *Kishun Singh* not only extended the principle laid down by their Lordships of the Judicial Committee in connection with a case where property has passed out of the family to cases where the security given by the father is sought to be enforced against his sons and also extended the rule laid down by the Judicial Committee as applicable to cases of complete alienation to cases of partial alienations such as mortgages. They point out that their Lordships limited their observations in *Girdharee Lall* v. *Kantoo Lall* to cases of conveyance executed by the father in consideration of an antecedent debt and sales in execution of decrees for the father's debt.

Now I do not profess to have exhausted the authorities on the question before us, but I think that the cases to which I have referred fairly illustrate the contending views expressed on that question. My learned brothers who decided the cases of *Debi Dat* v. *Jadu Rai* and *Babu Singh* v. *Bihari Lal* treated the case of *Jamna* v. *Nain Sukh* as overruled, contenting themselves by stating that, having regard to the Full Bench ruling in *Badri*

(1) (1907) I.L.R., 34 Calc., 735.

Prasad v. *Madan Lal* and the ruling of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*, the ruling in *Jamna* v. *Nain Sukh* can no longer be considered as law.

Is there any solid foundation for the contention that their Lordships of the Privy Council overruled in the cases which I have cited the clear and definite rule of the Mitakshara? According to that rule it is a settled point that property in ancestral estate is by birth, and that the father is subject to the control of his sons in regard to that estate, it being ordained that a gift or sale of such should not be made without the concurrence of all the sons, this being the only exception that "a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes" A son being under a pious obligation to pay his father's debts, an alienation by the father has been held to be binding on him in view of this obligation, but only, as I think, so binding where the debt is an antecedent debt. The rule of the Mitakshara it is said must be deemed to have been modified by the rulings of the Privy Council, but admittedly it has not been expressly overruled. The *dictum* in *Nanomi Babuasin* v. *Modhun Mohun* which I have quoted, namely:—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality" is relied on as establishing this proposition. It appears to me to do nothing of the kind. That the sons cannot set up their rights against their father's alienations for an antecedent debt I admit, but that they cannot resist the enforcement of a mortgage made by their father alone to secure money borrowed at the time and not proved to have been borrowed to meet a family necessity or to satisfy an antecedent debt I deny. It is contended that their Lordships words that the sons cannot set up their rights against their father's "creditors' remedies for their debts, if not tainted with immorality," justifies the view that a Hindu father can create a valid mortgage of the joint family property which will be binding on his

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C.J.

sons for a debt which is not antecedent. It seems to me that this interpretation of the dictum is too wide and that the words "against his creditors' remedies for their debts" refer to those remedies only which legally the creditors of the father possess, for example in the case of an ordinary debt a right to sue the son for the recovery of the debt on the basis of his pious obligation to satisfy that debt and on obtaining a decree to attach and sell the joint family property. This interpretation my brother Aikman suggested during the argument. The two principles of the Hindu Law are not antagonistic, the one being that a Hindu father can create a valid mortgage of the joint family property to satisfy an antecedent debt or a family necessity, but only to satisfy such debt or necessity, the other being that a Hindu son is bound under a pious obligation to satisfy his father's debt if it be not tainted with immorality. The right to maintain a suit in each case is of course controlled by the law of Limitation. In the one case there is a secured debt. In the other case there is merely a personal liability. According to the law as administered by the courts of this Province, a member of a joint family cannot validly mortgage his undivided share in ancestral property established in coparcenary on his own private account without the consent of the co-sharers in that estate. *Balgobind Das* v. *Narain Lal* (1). It follows from this that if the mortgage in suit is not binding *in toto* it is not binding as to the mortgagor's share in the mortgaged property.

I have examined the later decision of the Judicial Committee with a view to ascertian if there be any pronouncement which supports the broad interpretation of the ruling in *Suraj Bunsi Koer's* case for which the plaintiffs respondents contend, but without success. On the contrary their Lordships express their indisposition to extend the doctrine of the alienability by a coparcener even of his undivided share without the consent of his co-sharers beyond the decided cases. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2) Sir James W. Colvile, who delivered the judgment in *Suraj Bunsi Koer's* case, referring to the principle that the coparcener's powers of alienation is founded on his right to a partition, pointed out that *Suraj Bunsi Koer's*

(1) (1893) I. L. R., 15 All., 339. (2) (1880) L. R., 7 I. A., 181.

case was one of an execution against a mortgaged share and was decided "on the ground that the proceedings had then gone so far in the lifetime of the judgment debtor (in report 'mortgagor') as to give, notwithstanding his death, a good title against his co sharers to the execution purchasers." He then remarks:—"Their Lordships are not disposed to extend the doctrine of the alienability by a coparcener of his undivided share without the consent of his co-sharers beyond the decided cases." In the case of *Kameswar Prashad* v. *Run Bahadur Singh* (1) it was held by the Judicial Committee that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, a *creditor seeking to enforce a charge on such an estate is bound* at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities. Sir James W. Colvile again commented upon the decision in *Hanoomanpersaud Panday's* case and to the law as therein laid down, and then observes :—"It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities." This was, it will be observed, the case of a mortgage. In the case of *Madho Parshad* v. *Mehrban Singh* (2), in which it was held that where a Hindu without the consent of his co-parcener had sold his undivided share in the family estate for his own benefit and received the purchase money to his own use, his surviving co-parcener was entitled on his death under the Mitakshara law by survivorship to recover the share so sold from the purchaser, and that the latter had no equity or charge thereon against such survivor in respect of his purchase money. Lord Watson, who delivered the judgment of their Lordships, commented upon the decision in *Suraj Bansi Koer's* case and pointed out that the right of the purchaser in that case was affirmed on the ground that before the death of the judgment-debtor execution proceedings had gone so far as to constitute in favour of

(1) (1880) I. L. R., 6 Calc., 843. (2) (1890) L. R., 17 I. A. 19

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley C. J.

the judgment creditor a valid charge upon the joint estate to the extent of the undivided interest of the deceased which could not be defeated by that event, but at the same time observed that "if no proceedings had been taken to enforce the debt in the lifetime of the judgment-debtor, his interest in the property would have survived on his death to his sons so that it could not be afterwards reached by the creditor in their hands". Then again in the case of *Balgobind Das* v. *Narain Lal* (1), it was held to be the settled law of the Mitakshara as administered in Bengal and the North-Western Provinces, that a Hindu cannot without the consent of his co-parceners sell or mortgage his undivided share in ancestral estate for his own benefit. Sir Richard Couch in delivering judgment approved of the passage in the judgment in the case of *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, which I have quoted, and also the judgment in *Madho Prasad* v. *Mehrban Singh*. In regard to the judgment in the last mentioned case he observes :—"In the judgment delivered by Lord Watson it is said that the counsel for the appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate, and that he likewise conceded that the sales being without the consent of the co-parcener, and justified by legal necessity, were according to that law invalid ; but he maintained that the transactions being real and the prices actually paid, respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase money. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold except on condition of its being made at once available for the repayment of the price which he received but that the respondent who took by survivorship was not affected by any equity of that kind and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving coparcener, except by repealing the rule of the Mitakshara laws. In view of these rulings it seems to me impossible to hold that their Lordships

(1) (1893) L. R., 20 I. A. 116.

have extended the principle which underlies the decision in *Suraj Bansi Koer's* case. On the contrary they seem to me to have guarded themselves against the suggestion that the clear and explicit rule of the Mitakshara which precludes the alienability of immovable property by a coparcener without the consent of his coparceners had been repealed or might be treated as a dead letter.

For the foregoing reasons I am of opinion that the Court below was wrong in treating the ruling in *Jamna* v. *Nain Sukh* as no longer binding, and that the appeal should therefore be allowed as regards the first plea.

KNOX, J.—The question submitted to us for our consideration in this second appeal is whether a father, the head and managing member of a Hindu family, can mortgage the family property and exclude his sons from questioning the transaction, when it is not proved that the mortgage was executed on account of an antecedent debt. It has been found, and we must accept the finding, that (1) there is no evidence to show that the money which formed the consideration of the mortgage was borrowed or applied to the discharge of any antecedent debts. (2) The appellants, who are sons and grandsons of the mortgagor, who died before the institution of the suit, have not alleged, much less proved that the debt secured by the mortgage was tainted with immorality.

The text of Hindu law which bears upon the question is to be found in the Law of Inheritance from the Mitakshara, Chapter I, section I, paras. 27, 28 and 29. I give the translation as it occurs in the edition by Mr. Girish Chandra Tarkalankar (1870). So far as I can judge the translation is accurate, sufficiently accurate at any rate for the present purpose and so far as I can find the text under consideration has, with one exception, not been doubted. That exception is the passage in para. 27, which runs "no gift or sale should be made." The words न दानञ्च विक्रयः used in the passage are read by Raghunandana as वृत्तिलोपो विगर्हितः

According to him the correct reading in place of "no gift or sale should be made" is "the cutting off or the expenditure of the means of livelihood is censured." The only interest that

1909

CHANDRA-DEO SINGH *v.* MATA PRASAD.

Knox, J.

attaches to this reading is that apparently any tendency there has been to question the text is in the direction of widening, not of narrowing its meaning. The passage then runs as follows:—

"27. Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

28. An exception to it follows:—"Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family and especially for pious purposes."

29. The meaning of the text is this:—While the sons and grandsons are minors, and incapable of giving their consent to a gift, and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

So far as this passage can be any guide it lays down (1) the broad rule that though the power of a father in respect of movable property is ultimated, in the case of immovable property it is limited and he is with regard to it subject to the control of his sons, (2) an exception to that rule, *viz.*, that even a single owner may conclude a donation, mortgage or sale of immovable property under certain stated circumstances.

There is no longer any question that it is a duty of a son to pay the debts contracted by his father unless they are tainted with immorality. This text of the Mitakshara, Chapter VI-47 is almost too well known to need reproduction:—"A son is not bound to pay, in this world, his father's debts if they are incurred *for spirituous liquor*, or *for gratification of lust*, or *in gambling* nor is he bound to pay any unpaid fines or tolls, or idle gifts."

Viewed from the standpoint of Hindu text writers it seems obvious that a creditor who claims that he has lent money to the father of a Hindu family and then presses that father to charge immovable property with that debt has to follow the general rule and principle which applies to the proof of exceptions to a rule. On him lies the burden of proving that the father was by reason of a pious purpose empowered to conclude a mortgage. If he fails, his claim to enforce the charge fails. This principle is entirely in accord with the principles laid down for evidence in Hindu Law: Mitakshara on the Administration of Justice—Chapter I, section 6.

I do not propose to deal with the difficulties that have sprung from the case law that has risen round these texts. I have had the advantage of reading and carefully considering the exhaustive judgment of the learned Chief Justice on this point, and I can add nothing to it with advantage. I would therefore, *quoad* the first plea, allow the appeal and set aside the decrees of both the Courts below.

BANERJI, J.—This appeal arises out of a suit for the enforcement of a simple mortgage by sale of the mortgaged property. The mortgage was made by one Ram Narayan Kalwar and the property mortgaged is the joint ancestral property of the family. Both the mortgagor and the mortgagee are dead. The plaintiffs are the son and the grandson of the mortgagee. The defendants are the sons and grandsons of the mortgagor. The suit was defended by some only of the defendants, who denied the mortgage and urged that even if it was made by their ancestor it was not for a family necessity and was not therefore binding on them and their interests in the mortgaged property. The Court

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Banerji, J.

below has found, in concurrence with the Court of first instance, that the mortgage was executed by the defendants' ancestor for valuable consideration, that it was not proved that the money borrowed had been applied to the payment of an antecedent debt, and that it had not been alleged or proved that the debt secured by the mortgage was tainted with immorality. Accordingly a decree has been passed for sale of the mortgaged property. A question of limitation was raised but the lower appellate court did not try it in view of the conclusion at which it had arrived. From this decree the present appeal has been preferred and the two pleas set forth in the memorandum of appeal are:—(1) "The mortgage being not one for payment of an antecedent debt nor for family necessity was not binding on the appellants" and (2) "The claim based on the pious duty of sons to pay their father's debt was barred by time."

Upon the findings of the court below the position is this. The father and manager of a joint Hindu family consisting of father, sons and grandsons contracts a debt for such purposes as would make it the pious duty of the sons to pay the debt and as collateral security for it, mortgages joint ancestral property. The question is, can such a mortgage be enforced against the interests of the sons in the mortgaged property unless the mortgagee can show that the debt was incurred for family necessity? The question is really one of the burden of proof, that is, whether it is for the mortgagee to prove affirmatively that the loan was incurred for the necessities of the family or whether the sons must prove, in order to avoid liability for the debt, that it is tainted with immorality.

In my judgment, both upon principle and upon authorities, the *onus* is on the sons. The following propositions may be regarded as established beyond controversy:—

(1) It is the pious duty of a Hindu son to pay his father's debt if not tainted with immorality.

(2) In the case of a personal debt of the father the sons are liable, if they "cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge"; and "it is not necessary in order to establish a son's liability for his father's debt that it

should be shown that the debt was contracted for the benefit of the family." [See the Full Bench case of *Karan Singh* v. *Bhup Singh* (1).] For the realization of such a debt the joint ancestral property of the family is liable to be sold by auction and the burden of proof is solely on the son.

(3) If a mortgage is made by the father to pay an antecedent debt or if part of the consideration for such a mortgage is an antecedent debt due to the mortgagee himself, the mortgage may be enforced against the son even in the life-time of the father. The *onus* in such a case is on the son to prove that the debt was of such a nature that it was not his pious duty to pay it. This was held by the Full Bench of this Court in *Badri Pershad* v. *Madan Lal* (2).

(4) If joint ancestral property has been sold by the father for the payment of his debt or if it has been sold in execution of a decree for a mortgage debt or a simple debt of the father the son cannot recover the property unless he can show that the debt was contracted for immoral purposes. This has been held by their Lordships of the Privy Council in numerous cases commencing with the case of *Girdharee Lall* v. *Kantoo Lall* (3).

(5) Where a son comes into court to assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the *onus* is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it. See *Beni Madho* v. *Basdeo Patak* (4), approved of in subsequent cases.

What we have to consider is whether the burden of proof is shifted where a creditor of the father seeks as plaintiff to recover his debt by enforcement of the mortgage security given to him by the father.

The liability of a son to pay his father's debt arises, as pointed out by Mr. Mayne (Hindu Law, section 303, 7th edition) "from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts." This obligation has been held by their Lordships of the Privy Council

(1) (1904) I. L. R., 27 All., 16.
(2) (1893) I. L. R., 15 All., 75.
(3) (1874) L. R., 1 I.A., 321.
(4) (1890) I. L. R., 12 All., 99.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Banerji, J.

of the son for his father's debts arises. The amount of consideration paid down at the time of the sale is not a debt of the father though it may, in some cases, subsequently become a debt of the father. Therefore, a sale by the father must, in order to bind the son, be a sale for the necessities of the family or a sale for a consideration which consists of an antecedent debt of the father or of money received for the payment of the father's debts provided of course that the debt is not tainted with immorality. In the case of a mortgage, however, there is primarily a debt incurred by the father and the mortgage is only, as I have said above, collateral security for the debt. By reason of the son's pious duty he is liable for the father's debt and, therefore, for the mortgage made to ensure the recovery of the debt. In my judgment the case of a mortgage is not similar to that of a sale and the argument based on the analogy of a sale is fallacious. The distinction in this respect between a mortgage and a sale is often overlooked.

The view I have taken above is not only consistent with Hindu law and legal principles but is also supported by authority.

In the well known case of *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1) Lord Justice Knight Bruce, in delivering the judgment of their Lordships, said (at p. 421):—"Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt by the father. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate." In the case of *Girdharee Lall* v. *Kantoo Lal* (2) their Lordships, after quoting the above observations, remarked:—"That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the

(1) (1856) 6 Moo. I. A., 393. (2) (1874) L. R., 1 I. A. 321.

pious duty of the son to pay his father's debts, the ancestral property in which the son as the son of his father, acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce, 'the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate', whether ancestral or acquired by the creator of the debt." Their Lordships then proceeded to consider what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the ancestral property.

In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), their Lordships formulated the propositions which were deduced from the earlier rulings and stated the first of these propositions in the following terms:—"Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover the property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted." Relying upon the words "antecedent debt", as mentioned in the judgment of their Lordships, it has been contended in this case, and held in some cases, that a mortgage is not binding on the sons unless it was made for an antecedent debt. In my humble judgment it would be placing too strained a meaning on the decision of their Lordships to hold that they intended to lay down the general rule that in every case of a transfer by the father, whether it was a sale or a mortgage, the transfer would not be binding on the son unless it was made for an antecedent debt. In the particular case before their Lordships a sale had taken place for an antecedent debt and, therefore, in formulating the rules applicable to such a sale, reference seems to have been made to an antecedent debt. As I have pointed out above, a sale by the father not made for a family necessity, would not be binding on the sons unless it was made for an antecedent debt which was binding on them by reason of their pious liability to pay their

(1) (1878) I. L. R., 5 Calc., 148.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Banerji, J.

father's debts. In the absence of an antecedent debt the consideration for the sale cannot itself be deemed to be a debt of the father and no question of pious obligation would arise. It was therefore necessary, in the cases before the Judicial Committee, to refer to antecedent debts. But I fail to find anything in their Lordships' judgment to show that they held or intended to hold that in the case of a mortgage too it must have been made by the father for an antecedent debt.

The most important decision of the Privy Council, which in my opinion concludes the matter, is that in the case of *Nanomi Babuasin* v. *Modhun Mohun* (1). After referring to the fact that the decisions either in India or in the Privy Council were not in harmony, Lord Hobhouse, in delivering the judgment of their Lordships, laid down the law in the following terms, apparently with a view to settle all controversy in future :— "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or *against the creditors' remedies for their debts* if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." That by the above pronouncement Lord Hobhouse intended to decide the matter conclusively and to bring into harmony all conflicting rulings is manifest from the remarks made by him in the later case of *Mahabir Pershad* v. *Moheswar Nath Sahai* (2) wherein he expressed the hope that recent decisions of the Committee would lessen the difficulties which had been felt before. "The words *or against his creditors' remedies for their debts*" do not, in my opinion, leave any room for doubt. What are a creditors' remedies for his debt? His remedies are a suit, a decree in the suit and a sale in pursuance of the decree. In the case of a mortgage his remedy by decree is a decree for the sale of the mortgaged property. According to their Lordships, the sons cannot set up their rights against the remedies to which I have referred, if the debts are not tainted with immorality. There is no reason to assume that their Lordships

(1) (1885) I. L. R., 13 Calc., 21 : L. R., 13 I. A., 1.

(2) (1890) I. L. R., 17 Calc., 584 (588.)

confined their remarks to the remedies of an unsecured creditor and did not intend them to apply to secured creditors also. In my judgment the words quoted above contemplate every one of the remedies open to every class of creditors whose debts are not of an immoral nature. This is further evident from the following observations of their Lordships:— "If his (the debtor's) debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or *the creditor might legally procure a sale of it by suit.*" It would surely be putting too limited a meaning on the words of their Lordships to hold that these remarks do not apply to the case of a mortgagee. Upon the authority of this ruling of the Privy Council it is no longer open to a son to resist the claim of a mortgagee from his father, except on the ground that the debt was not incurred at all or that it is tainted with immorality or that it is time-barred and it is not incumbent on the mortgagee to prove that the debt was contracted for the benefit of the family. In view of this ruling of their Lordships the dictum contained in the decision in *Kameswar Pershad* v. *Run Bahadur Singh* (1) on which Mr. *Gokul Prasad* relied, cannot be followed. If it be assumed that the question now before us is not concluded by the ruling in *Nanomi Babuasin's* case that question has never yet been decided by their Lordships in any other case. It is, therefore, open to us to consider it on its own merits. The question did not arise, and was not decided, in the case of *Suraj Bansi Koer*, which was a case of a sale in execution of a decree passed upon a mortgage given by the father for an antecedent debt. And I am not aware of any other ruling of the Privy Council on the subject.

Turning now to the decisions of the different High Courts in this country, I shall first consider those of our own Court.

In *Sita Ram* v. *Zalim Singh* (2) a mortgagee from the father and head of a joint Hindu family sued the mortgagor for sale of the joint ancestral property mortgaged by him. During the pendency of the suit the mortgagor died and his son was brought on the record as his legal representative. It

(1) (1880) I. L. R., 6 Calc., 843 (847). (2) (1886) I. L. R., 8 All., 231.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Banerji, J.

was found that the money was not borrowed to meet any family necessity and on this ground the Court below made a decree for the sale of the father's interests only and exempted the share of the son. Petheram, C. J., and Tyrrell, J., held, following the case of *Nanomi Babuasin* v. *Modhun Mohun*, that the mortgagee was entitled to a decree for the sale of the whole of the joint ancestral property, it not being proved that the loan was taken for immoral purposes. The decree of the Court below was set aside and a decree was made enforcing the mortgage against the entire family property.

In *Kishan Lal* v. *Garuruddhwaja Prasad Singh* (1) the Court below found that the mortgagor had taken the loan for his own private purposes and dismissed the suit against his minor son. Blair and Burkitt, JJ., held that this was not a sufficient reason for exonerating the son from the pious duty of paying his father's debt and made a decree for sale of the son's interests comprised in the mortgage. Burkitt, J., who delivered the judgment of the Court, said:—"It is now settled law in this Court since the case of *Badri Prasad* v. *Madan Lal* (2) that a son can be sued jointly with his father to recover a debt contracted by the father, if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father's debt."

In *Badri Prasad* v. *Madan Lal* (2) which is a decision of a Full Bench of the whole Court, the father mortgaged joint ancestral property, the consideration for the mortgage being some money advanced at the time and some personal debts due by the father to the mortgagee himself by which the family did not benefit, but which were not tainted with immorality. It was held that the matter was concluded by the decision of their Lordships of the Privy Council in *Nanomi Babuasin's* case, and that the sons' interests were liable under the mortgage. A decree was made for sale of the mortgaged property including the interests of the sons, in enforcement of the mortgage. In considering the effect of this decision the learned Judges who decided the case of

(1) (1899) I. L. R., 21 All., 238. (2) (1893) I. L. R., 15 All., 75.

Maharaj Singh v. *Balwant Singh* (1), to which I shall refer hereafter, expressed the opinion that according to this decision "no obligation lay on the plaintiff to prove that any inquiry was made by the lenders as to the necessity of the loans when money was advanced" by them and also the burden of proving that the debts were tainted with immorality lay upon the son.

In *Debi Dat* v. *Jadu Rai* (2), *Chail Behari Lal* v. *Gulzari Mal* (3), *Kallu* v. *Fateh* (4), and *Babu Singh* v. *Bihari Lal* (5), it was held that it is not necessary for the mortgagee to prove that the debt secured by the mortgage was incurred for the benefit of the family and that the burden of proof lies on the son and not on the mortgagee, plaintiff. To the first two of these cases my brother Aikman was a party. In *Maharaj Singh* v. *Balwant Singh* (1) the question was not decided, but the learned Judges (Stanley, C. J., and Burkitt, J) observed "in passing" that in their opinion it would be "not unreasonable to require proof on the part of the creditor that before he entered into the transaction he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family." (p. 541)

The only case in which the point was decided and the contrary view was held in this Court is that of *Jamna* v. *Nain Sukh* (6). The reasoning by which the judgment in that case is supported was criticised and dissented from by the Bombay High Court in *Chintamanrav Mehendale* v. *Kashinath* (7). With much of that criticism I agree. For the reasons I have already stated, I am, with great respect, unable to concur in this ruling. Furthermore, one of the cases from which the rule of law laid down in that case was deduced is that of *Lal Singh* v. *Deonarain Singh* (8) decided by Straight and Tyrrell, JJ. With reference to that case the same learned Judges said, in the later case of *Bhawani Bakhsh* v. *Ram Dai* (9), that upon further consideration they had come to the conclusion that "so far as it laid down that the *onus* rested

(1) 1906) I. L. R., 28 All., 508.
(2) (1904) I. L. R., 24 All., 459.
(3) (1909) 6 A. L. J. R., 133.
(4) (1904) 1 A. L. J. R., 316.
(6) (1887) I. L. R., 9 All., 493.
(7) (1889) I. L. R., 14 Bom., 320.
(8) (1886) I. L. R., 8 All., 279.
(9) (1891) I. L. R., 13 All., 216.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Banerji, J.

upon the creditor the case had been wrongly decided, having regard to the decisions of the Privy Council." I see no reason to alter the opinion expressed by me in other cases that the ruling in *Jamna* v. *Nainsukh* can no longer be regarded as good law.

I may mention that since the hearing of this appeal I have come across an unreported case decided by the learned Chief Justice and Mr. Justice Burkitt, the principle of which supports the view taken above. It is the case of *Lala Sobba Ram* v. *Ran Singh*, F. A. No. 70 of 1905, decided on the 20th of April 1907, after the decision of the case of *Maharaj Singh* v. *Balwant Singh* (1). The facts of the case are set forth in the judgment of those learned Judges in *Ran Singh* v. *Sobha Ram* (2), which was a cross appeal from the same decree. The claim was to recover the amount due on a mortgage of the 24th of August 1893, executed by Badan Singh the father of the defendants, and for sale of the ⅘th interests of the defendants in the mortgaged property. The amount secured by the mortgage was Rs. 2,000 of which Rs. 900 had been paid in cash on the date of the bond. The Subordinate Judge dismissed the claim for the amount of the bond on the finding that the debt was incurred for purposes of immorality, and also because the bond "was not executed by Badan Singh on account of any legal necessity or for the benefit of the joint family." On appeal by the plaintiff the learned Chief Justice and Mr. Justice Burkitt said in their judgment:—"We do not propose to consider, was the debt contracted for any legal necessity or for the benefit of the joint family. *These matters appear to us to be immaterial.*" (The italics are mine.) The learned Judges then proceeded to consider the evidence as to the nature of the debt and came to the conclusion that the defendants had failed to prove that it was tainted with immorality. They accordingly made a decree for sale of the interests of the sons in the mortgaged property. It was clear from the judgment that the learned Judges were of opinion that the question of necessity did not arise in a suit by the mortgagee against the sons and was immaterial for the purposes of the suit. The necessary

(1) (1906) I. L. R., 28 All., 508. (2) (1907) I. L. R., 29 All., 544.

inference is that the learned Judges considered that the burden did not lie on the plaintiff in such a suit to prove necessity.

It is thus manifest that, with the exception of the solitary case of *Jamna* v. *Nain Sukh*, the rulings of this Court so far from bearing out the contention of the appellants are against it.

The decisions of the Bombay High Court fully support my view. In *Chintamanrav Mahendale* v. *Koshinath* (1), Sarjent, C. J. and Nanabhai Haridas, J., held, in concurrence with West and Birdwood, JJ., that the effect of the decision of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (2), was that "the father's disposition of the family estate. . . is made to affect the sons' as well as the fathers' interest, except so far as the son can establish that the voluntary disposal was made under circumstances which deprived the father of the disposing power." They further held that "this view of the power of the father to bind the sons' interest in the family estate, except in certain special cases, necessarily throws the *onus* on the sons of defeating his creditors' remedies against the ancestral estate by establishing the existence of those circumstances." Following this ruling it was held by Parsons and Ranade, JJ., in *Ramchandra* v. *Fakirappa* (3), that "ancestral property is available for the payment of the debt of the father, unless the son can prove that the debt was contracted for an immoral or illegal purpose." The suit in that case was brought by a mortgagee to enforce two mortgage bonds against the father the mortgagor, and his sons. The District Judge dismissed the claim in respect of one of the bonds on the ground that it had not been proved to be for family necessities. The High Court reversed the decision of the Judge and decreed the claim for sale.

The decisions of the Madras High Court are conflicting. In *Chidambara Mudaliar* v. *Koothaperumal* (4), to which I have already referred, Boddam and Bhashyam Ayyangar, JJ., held that a mortgage made by the father for a debt then incurred is binding on the sons' interest if not tainted with immorality. This ruling was reversed by a Full Bench of three Judges (White, C.J., and Subrahmania Ayyar and Davis, JJ.,) in

(1) (1889) I. L. R., 14 Bom., 320.
(2) (1885) I. L. R., 13 Calc., 21.
(3) (1900) 2 Bom., L. R., 450.
(4) (1903) I. L. R., 27 Mad., 326.

1909

CHANDRA DEO SINGH v. MATA PRASAD.

Banerji, J.

Venkataramanaya Pantulu v. *Venkataramana Doss Pantulu* (1). The learned Judges said that having regard to the word "antecedent," as used in the judgment of the Privy Council in *Suraj Bansi Koer's* case, they were unable to adopt the view taken in *Chidambara Mudaliar* v. *Koothaperumal*, "although on principle they might be disposed to do so." For the reasons I have given in an earlier part of this judgment I feel myself unable to take the same view of the effect of the decision in *Suraj Bansi Koer's* case as the learned Judges of the Full Bench.

As for the rulings of the Calcutta High Court they also are not in harmony. The first case on the point is that of *Luchmun Dass* v. *Giridhur Chowdhry* (2), decided by a Full Bench. In that case it was held that "the mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property." In *Gunga Prosad* v. *Ajudhia Pershad Singh* (3), however, Mitter and Maclean JJ., made a decree for the sale of the mortgaged property both against the father and the son. In *Khalil-ul-Rahman* v. *Gobind Pershad* (4), the Full Bench ruling referred to above was followed and a decree made in the terms laid down in that ruling. The same was the case in *Surja Prasad* v. *Golab Chand* (5), decided by Ghose and Harington, JJ. These cases were dissented from by Brett and Sharf-ud-din, JJ., in *Maheshwar Dutt Tewari* v. *Kishun Singh* (6), and it was held that a mortgage made by a father on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the son. The learned Judges considered that in view of the decisions of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (7), and *Bhagbut Pershad Singh* v. *Girja Koer* (8), the law laid down by the Full Bench

(1) (1905) I. L. R., 29 Mad., 200.
(2) (1880) I. L. R., 5 Calc., 855.
(3) (1881) I. L. R., 8 Calc., 131.
(4) (1892) I. L. R., 20 Calc., 328.
(5) (1900) I. L. R., 27 Calc., 762.
(6) (1907) I. L. R., 34 Calc., 164.
(7) (1885) I. L. R., 13 Calc., 21.
(8) (1888) I. L. R., 15 Calc., 717.

in *Luchmun Dass* v. *Giridhur Chowdhry* (1), could not be held to be binding. All these decisions were discussed by Mookerjee and Holmwood, JJ., in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (2), and the learned Judges held that the Full Bench ruling mentioned above was still binding on the Court, apparently on the ground that it had not been expressly overruled by the Privy Council. They were of opinion that as the decision of the Full Bench was binding on them it was "unnecessary to inquire whether it is well founded on reason and principle," but they added "that the matter, if it were *res integra*, might not be free from considerable doubt and difficulty." With regard to these rulings I may quote the following apposite remarks of Mr. J. C. Ghose in his Principles of Hindu Law, 2nd edition, page 445:—"The rule that if the debt is antecedent, say by a day, to the mortgage, it binds the estate, but that it does not do so if the consideration for the mortgage is paid at the time, is certainly based on the earlier rulings of our Courts, but it is difficult to say that it is based on reason or on any principle of law. The distinction is so fine that for practical purposes it might have been disregarded. The rule of Hindu Law is clear that the sons cannot even take ancestral property without paying the father's debts, for on partition the father's debts, which are not improper, should be first paid."

For the reasons stated above the conclusions at which I have arrived are that as regards a Hindu son's liability to pay his father's debt not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt, that unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property, whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage; and that in a suit brought against the son to enforce the mortgage the *onus* is not on the plaintiff to prove that the debt was incurred for the benefit of the family but that

(1) (1880) I. L. R., 5 Calc., 855. (2) (1907) I. L. R., 34 Calc., 735.

1909

CHANDRADEO SINGH v. MATA PRASAD.

it is for the son to prove that having regard to the nature of the debt it was not his pious duty to discharge it.

I would, therefore dismiss the appeal.

AIKMAN, J:—The question which has to be decided by this Full Bench is one upon which great conflict of opinion has prevailed. This conflict of opinion has long existed. So far back as 1885 Lord Hobhouse in delivering judgment in the case *Nanomi Babuasin* v. *Modhun Mohun* (1) said:—"It is impossible to say that the decisions on the subject are on all points in harmony either here or in India." The numerous cases of more recent date cited by the learned counsel on each side in their able argument before us, show that great divergence of opinion still prevails. I do not propose to enter on a review of the mass of authorities cited to us. The most important of these have been set forth by the learned Chief Justice in his judgment, which I have had the advantage of reading. The question we have to decide is whether a mortgage of joint family property executed by a Hindu father as security for money advanced to him can be enforced *as a mortgage* after his death against his sons and grandsons there being on the one hand no suggestion that the mortgage debt was tainted with immorality, whilst on the other there is nothing to show that the money was taken either to discharge an antecedent debt, or to meet family necessities. In deciding this question we have to bear in mind two great principles of Hindu Law, one being that sons by birth have an equal ownership with the father in respect of ancestral immovable property; the other that so long as a father's debts are not tainted with immorality, sons are under a pious obligation to discharge them. The question is whether the liability of a son for his father's debts overrides the principle of the son's co-parcenary rights to such an extent as to enable a Hindu father, so long as in incurring obligations he avoids the taint of immorality, to deal with the joint family property as if he were the full owner of the property in which Hindu Law declares he has only a limited interest. In my opinion the question must be answered in the negative. A son may be liable to discharge his father's debts, and the father's creditor by taking proper steps may be

(1) (1885) L. R., 13 I. A., 1.

able to sell up the son's interests in the family property which has passed to the son on his father's death. But in my judgment, it does not follow from this that, unless under special circumstances which are not shown to exist in this case, a Hindu father can make a mortgage of his son's interests in the family property which can be enforced against the sons as a mortgage after the father's death.

It is now settled by decisions of the Privy Council that a father can make a mortgage of the joint family estate in order to discharge an antecedent debt, and that such a mortgage can be enforced as a mortgage against the sons. At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property.

In the judgment in the case referred to above, *Nanomi Babuasin* v. *Modhun Mohun*, there occurs the often quoted passage:—"Destructive as it may be of the principles of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle, that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think there is now no conflict of authority."

It will be noted that their Lordships here admit that the decisions referred to are destructive of the principle of independent co-parcenary rights which the sons undoubtedly possess.

In my opinion we should not go further in destroying the important principle of the sons' co-parcenary rights than we are compelled by authoritative decisions to do. We have not been referred to any decisions binding upon us as a Full Bench which compel us to hold that the plaintiffs respondents who have not succeeded in showing that the mortgage upon which they come into court was either for an antecedent debt, or to raise money

1900

CHANDRA DEO SINGH v. MATA PRASAD.

for the necessities of the family can enforce their bond as a mortgage, against the defendants.

I was a party to one of the decisions relied on by the courts below, i.e., *Debi Dat* v. *Jadu Rai* (1). In that case it was taken for granted that the decision of this court in *Jamna* v. *Nain Sukh* (2) could no longer be considered as law. After hearing the question more fully argued, I am not prepared to adhere to the view then expressed.

In the present case the mortgagee took a mortgage from one whom he must be deemed to have known to possess only a limited interest in the property mortgaged and according to the law as laid down by the Privy Council in *Kameswar Pershad* v. *Run Bahadur Singh* (3) and in *Jamna* v. *Nainsukh*, as well as the principle embodied in section 38 of the Transfer of Property Act it was for him to show that he had taken reasonable care to satisfy himself that circumstances existed which would justify the father in mortgaging the joint family estate in derogation of his sons' rights. This burden the plaintiffs-respondents have failed to discharge. I therefore concur with the learned Chief Justice in thinking that the first plea in the memorandum of appeal must succeed, and in the order proposed by him.

RICHARDS, J.—This appeal arises out of a suit to realize the sum of Rs. 976 principal and interest alleged to be due on foot of a mortgage dated the 4th of September 1883 and made by one Ram Narain Singh in favour of one Rám Narain Kalwar. The plaintiffs are the son and grandson of Ram Narain Kalwar and the defendants are the sons and grandsons of Ram Narain Singh, who constituted a joint Hindu family. It was alleged in the plaint that the mortgage was executed by Ram Narain Singh as manager of the family for the benefit thereof. In the written statement it was not admitted that the mortgage was executed by Ram Narain Singh, as manager, or that the family were benefited, and it was alleged that the loan was simply the recent and personal debt of Ram Narain Singh. It was not alleged that the money was raised for immoral purposes.

The courts below have found that the mortgage was executed for good consideration. The court of first instance found that

(1) (1902) I.L.R. [illegible] 459. — (2) (1887) I.L.R., 9 All., 493.
(3) (1 [illegible] R., 6 Calc. 843, (847).

1909

CHANDRADEO SINGH v. MATA PRASAD.

Richards, J.

it was not proved that the creditor made reasonable inquiries such as would statisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family. The lower court of appeal also found that it was not proved that the money was borrowed to pay off an "antecedent" debt. On the other hand both courts found that the defendants had not proved that the debt was tainted with immorality. On these findings both the courts below concurred in granting the usual decree for the sale of the mortgaged property under section 88 of the Transfer of Property Act, 1882. Hence the present appeal. The defendant's counsel in opening his argument admitted that if the plaintiffs had sued for a simple money decree they would on the findings (subject to the law of limitation) have been entitled to such a decree against the defendants and that the ancestral property and all other property acquired from Ram Narain Singh, would have been liable to be sold in execution of such a decree. Mr. *Dillon* also admitted that if the plaintiffs had proved that the mortagage had been made to secure a prior debt (even the prior private debt of Ram Narain Singh himself) the mortagage would have been a good mortagage and the defendants could not have resisted the sale of the ancestral property. It is contended however that the plaintiffs in the persent suit were not entitled to a decree for sale of the property comprised in the mortgage because they failed to prove that there was an "antecedent" debt. The plaintiffs on the other hand say that once it was proved that the mortagage was made for valuable consideration the defendants as sons and grandsons of Ram Narain Singh are liable for his debts and that the property can and should be sold under the mortagage created by him and that the only defence open to the defendants was to prove that the debt was tainted with immorality. There are two principles of Hindu law which both plaintiffs and defendants admit to be applicable in the present case. The first principle is that no single member of a joint Hindu family can sell or mortgage the family property without the consent of the other members of the family save for legal necessity or for pious purposes. I may here say that for the purposes of this principle Ram Narain Singh must be looked upon as

1909

CHANDRADEO SINGH v. MATA PRASAD.

Richards, J.

simply a member of the co-parcenary body without any reference to his powers as father or manager of the family. The second principle is that if a Hindu incurs debts his sons and grandsons are liable to pay these debts unless they are tainted with immorality. It is not surprising that the attempt to give effect to each of these principles has given rise to much difficulty and confusion. There is much conflict in the decisions, not only in this Court but also in other Provinces of India and their Lordships have recognized that even in the decisions in the Privy Council there is not complete harmony. It seems to me after hearing the arguments in the present case, in the course of which we were referred to a vast number of judicial decisions, that it would be well if the Legislature would step in and settle the matter once and for all. I confess myself quite unable to reconcile the conflict even in the more recent decisions. In the absence of authority I should feel much inclined to hold that where a plaintiff claims under a deed executed by a member of a joint family alienating absolutely or partially (that is by sale or mortgage) the family property, the onus should lie upon him of showing the existence of circumstances which alone under Hindu law would justify the alienation, that is to say, "legal necessity" or a pious purpose. In cases where the alienation was made to meet an old or what might be called an "ancestral" debt I think that the Court would be justified in holding that proof of this fact would be at least *prima facie* sufficient evidence of legal necessity. Again, in the absence of authority, I should also be inclined to hold that under no circumtances could a member of a joint family alienate (wholly or partially) the family property for his own private debt, whether antecedent or otherwise. The creditor could, no doubt, sue the sons or grandsons and obtain a simple money decree and sell the property, in execution, but he would not acquire the priority and other rights that a mortgage gives. Were it possible so to hold, it seems to me that effect could be given in a measure at least to the two admitted principles of Hindu law stated above. It is however impossible having regard to the ruling of their Lordships in the case of *Nanomi Babuasin* v. *Modhun Mohun* (1)

(1) (1885) I. L. R., 13 Calc., 21.

to hold that under *all* circumstances it is necessary for the creditor to prove legal necessity. At page 35 of the report of the case of *Nanomi Babuasin* v. *Modhun Mohun* their Lordships say:—"Destructive as it may be of the principle of independent coparcenary rights in the sons the decisions have for some time established the principle that the sons cannot set up their rights against the father's alienation for an *antecedent* debt or against his *creditors' remedies for their debts* if not tainted with immorality." Unfortunately it is not very clear what their Lordships meant by the expressions "antecedent debt" or "creditors' remedies for their debts." Possibly their Lordships meant by "antecedent debts" ancestral debts and by "creditors' remedies for the debts" their Lordships meant the creditors' remedies for such debts, *i.e.* ancestral debts. The meaning of the expression "antecedent debt" has led to a conflict of decision between this Court and the Calcutta High Court. If the expression "antecedent debt" is to be construed literally, it would follow that a Hindu father might incur a debt for a private purpose and a few days after, mortgage the family property to secure that debt and the mortgage would be a good mortgage according to the judgment of their Lordships and binding upon the sons and grandsons. In the case of *Badri Prasad v. Madan Lal* (1), a mortgage of the family property was made to secure moneys advanced antecedently to a Hindu father, not as manager or for family purposes, yet it was held that the mortgagee was entitled to have the property sold, the debts not being tainted with immorality. This was the unanimous decision of a Bench of six judges of this Court, and it is binding upon us. It is probable that the advances in this case were made a considerable time before the mortgage, but once we hold that a private personal debt of a Hindu father can be an "antecedent" debt within the meaning of the expression in their Lordships judgment it is very difficult to understand on what principle money advanced a year or a week before (or even simultaneously with) the mortgage is not an "antecedent" debt. In the usual *form of a mortgage* in this country there is a recital that the mortgagor has taken a loan from the mortgagee and an hypothecation of the property follows; a mortgage in

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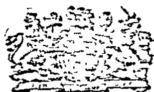
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Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... ... 6 a. (1 a.)

Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1903 ... 7 a. (1 a.)

Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ... ... 6 a. (2 a.)

Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 a. 6 p. (1 a.)

Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... ... 5 a. 6 p. (1 a.)

Act X of 1889 (Ports), as modified up to 1st April, 1901 ... ... 11 a. (1 a.)

Act XIII of 1889 (Cantonments), as modified up to 1st March, 1899 ... 7 a. (1 a.)

Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... 4 a. (1 a.)

Act IX of 1890 (Railways), as modified up to 1st June, 1903, with an Index ... ... Re. 1-8 (1 a.)

Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ... ... 3 a. 6 p. (1 a.)

Act XII of 1891 (Repealing and Amending Act), showing the schedules as modified up to 31st May, 1903 ... ... 12 a. (1 a. 6 p.)

Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... ... 1 a. 6 p. (1 a.)

Act I of 1894 (Land Acquisition), with footnotes ... ... 7 a. (1 a.)

Act VIII of 1894 (Tariff), as modified up to 1st February, 1903 ... ... 3 a. (3 a.)

Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... 2 a. 6 p. (1 a. 6 p.)

Act IX of 1897 (Provident Funds), as modified up to 1st April, 1904 ... 1 a. 6 p. (1 a.)

Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1903 ... ... Re. 1-10 (6 a.)

Act VIII of 1899 (Petroleum), as modified up to 1st December, 1903 ... 2 a. (1 a.)

Act XIX of 1899 (Currency Conversion (Army)), as amended by Act VII of 1900 ... ... 1 a. (1 a.)

Act III of 1900 (Prisoners), as modified up to 1st March, 1900 ... ... 3 a. 6 p. (1 a.)

Act XV of 1903 (Extradition), as modified up to 1st December, 1903 ... 3 a. 6 p. (1 a.)

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1903 ... ... 3 a. 6 p. (1 a.)

Regulation V of 1873 (Bengal (Eastern) Frontier), as modified up to 1st July, 1903 ... ... 1 a. 6 p. (1 a.)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a.)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 ... ... 10 a. (4 a.)

Regulation VI of 1895 (Ajmer Rural Boards), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a.)

Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1903 ... ... 5 a. (1 a.)

Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1903 ... ... 1 a. 6 p. (1 a.)

Regulation I of 1896 (Rohtak Hill Tribes), as modified up to 1st April, 1904 ... ... 6 a. (1 a.)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (in sheets) of the Governor General of India in Council from 1834 to 1904.

Regulations made under the Statute 33 Vict., Cap. 3, from the 1st of 1872 to 1904. ...

(The above may be obtained separately. The price depends on size.)

IV. TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL IN COUNCIL.

Act XX of 1847 Copyright as modified up to 1st May, 1896 ... ... In Nagri. 1 a. 3 p. (1 a.)
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes ... In Urdu. 6 p. (1 a.)
Ditto ditto ... ... In Nagri. 6 p. (1 a.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 ... In Urdu. 6 p. (1 a.)
Ditto ditto ... In Nagri. 6 p. (1 a.)
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 ... In Urdu 6 p. (1 a.)
Ditto ditto ... In Nagri. 6 p. (1 a.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ... ... In Urdu, 3 p. (1 a.)
Ditto ditto ... In Nagri, 3 p. (1 a.)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903... In Urdu, 6 p. (1 a.)
Ditto ditto ... In Nagri, 6 p. (1 a.)
Act XX of 1856, as modified up to 1st November, 1903 ... ... In Urdu, 2 a. 6 p. (1 a.)
Ditto ditto ... ... In Nagri, 2 a. 6 p. (1 a.)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 .. .. In Urdu, 1 a. (1 a.)
Ditto *ditto* ... *In Nagri, 1 a. (1 a.)*
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ... ... In Urdu, 1 a. (1 a.)
Ditto ditto ... In Nagri, 1 a. (1 a.)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 .. In Urdu, 1 a. 6 p. (1 a.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874 ... ... In Urdu, 3 p. (1 a.)
Ditto ditto ... In Nagri, 3 p. (1 a.)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904 ... ... In Urdu, 3 p. (1 a.)
Ditto ditto ... In Nagri, 3 p. (1 a.)
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903 ... In Urdu, 1 R., 1 a. 6 p. ([illegible])
Ditto ditto ... In Nagri, 1 R., 1 a. 6 p. ([illegible])
Act V of 1861 (Police), as modified up to 7th March, 1903 ... ... In Urdu, 2 a. 3 p. (1 a.)
Ditto ditto ... In Nagri, 2 a. 3 p. (1 a.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898 ... In Urdu, 1 a. 3 p. (1 a.)
Ditto ditto ... In Nagri, 1 a. 4 p. (1 a.)
Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ... In Urdu, 1 a. (1 a.)
Ditto ditto ... In Nagri, 1 a. (1 a.)
Act VI of 1864 (Whipping), as modified up to 1st April, 1900 ... In Urdu, 1 a. [illegible] p. (1 a.)
Ditto ditto ... In Nagri, 1 a. [illegible] p. (1 a.)
Act III of 1865 (Carriers) as modified up to 31st May, 1903 ... In Urdu, [illegible]
Ditto ditto ... In Nagri, [illegible]
Act III of 1867 (Gambling), as modified to 1st December, 1896 ... In [illegible]
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895 ... ... In [illegible]

Ditto ditto
Act VII of 1870 (Court-fees), as modified up to 1st December, 1896

Ditto as modified up to 1st October, 1899
Act I of 1871 (Cattle trespass) as modified up to 1st December, 1903
Ditto ditto
Act XXIII of 1871 (Pensions) ... ...
Ditto ... ...
Act I of 1872 (Evidence), as modified up to 1st May, 1903 ..
Ditto ditto ...
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904
Act IX of 1872 (Contract), as modified up to 1st September, 1899

Act	Price
Act IX of 1872 (Contract), as modified up to 1st September, 1899 ...	In Nagri. 9 a. 6 p. (3 a.)
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ...	In Urdu. 4 a. (2 a.)
Ditto ditto ...	In Nagri. 4 a. (2 a.)
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899	In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 3 p. (1 a.)
Act X of 1873 (Oaths), as modified up to 1st February, 1903	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. (1 a.)
Act IX of 1875 (Majority), as modified up to 1st May, 1906	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ...	In Urdu. 4 a. 6 p. (1 a. 6 p.)
Ditto ditto ...	In Nagri. 4 a. 3 p (1 a. 6 p)
Act III 1877 (Registration), as modified up to 1st December, 1896 ...	In Urdu 4 a. 3 p. (2 a.)
Ditto ditto ...	In Nagri. 4 a. 6 p. (2 a)
Act I of 1878 (Opium), as modified up to 1st December, 1896 ...	In Nagri. 1 a. 6 p (1 a)
Act VII of 1878 (Forests), as modified up to 1st December 1903 ...	In Urdu. 4 a. (1 a 6 p)
Ditto ditto ...	In Nagri. 3 a. 9 p. (1 a. 6 p.)
Act XI of 1878 (Arms), as modified up to 1st May, 1904	In Urdu. (2 a. (1 a.)
Ditto ditto	In Nagri. 2 a (1 a.)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902	In Urdu. 2 a (1 a)
Ditto ditto ...	In Nagri. 2 a. (1 a.)
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896	In Urdu. 2 a. 6 p. (1 a)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a.)
Act XV of 1881 (Factories), as modified up to 1st April, 1891 ...	In Urdu. 1 a. 6 p (1 a.)
Ditto ditto ...	In Nagri. 1 a. 6 p. (1 a.)
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898	In Urdu. 9 a. (1 a. 6 p.)
Ditto ditto ...	In Nagri. 9 a. (1 a. 6 p.)
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ...	In Urdu. 6 a. 9 p. (2 a)
Ditto Ditto ...	In Nagri. 6 a. 9 p. (2 a.)
Act VI of 1882 (Companies), as modified up to 1st August, 1906 ...	In Urdu. 13 a. 9 p. (3 a)
Ditto ditto ...	In Nagri. 14 a. (3 a)
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December 1899	In Urdu. Rs. 1-4. (6 a)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	In Urdu. 1 a (1 a.)
Ditto ditto ...	In Nagri. 1 a. (1 a)
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ...	In Urdu. 4 a 9 p. (1 a. 6 p.)
Ditto ditto ...	In Nagri. 4 a. 6 p. (1 a. 6 p)
Act IV of 1884 (Explosives), as modified up to 1st May, 1890 ...	In Urdu. 1 a. 3 p. (1 a)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a.)
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ...	In Urdu. 3 a. 6 p. (1 a. 6 p)
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a 6 p)
Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1906	In Urdu. 6 p (1 a.)
Ditto ditto ...	In Nagri. 6 p. (1 a)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899...	In Urdu. 2 a 6 p. (1 a.)
Act II of 1885 (Negotiable Instruments Amendment). ...	In Urdu. 9 p. (1 a)
Act III of 1885 (Transfer of Property Amendment)	In Urdu. 3 p. (1 a)
Act X of 1885 (Oudh Estates Amendment)	In Urdu. 3 p. (1 a.)
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ...	In Urdu. 1 a. 6 p. (1 a)
Act XXI of 1885 (Madras Civil Courts Amendment)	In Urdu 3 p. (1 a)

Act II of 1886 (Income tax), as modified up to 1st April, 1903 ... ... In Urdu 3 a. (1 a. 9 p.)
Ditto ditto ... In Nagri. 3 a. (3 a. 9 p.)
Act IV of 1886 (Amending Section 265 of Contract Act) ... ... In Urdu. 3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration) ... ... In Urdu. 1 a 3 p. (1 a)
Act VII of 1886 (Registration Amendments) ... ... In Urdu. 3 p. (1 a.)
Act X of 1886 (Criminal Law Amendment) ... ... In Urdu. 9 p (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ... In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ... In Nagri. 3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891 ... ... In Urdu. 9 p. (1 a.)
Ditto ditto ... In Nagri. 9 p. (1 a)
Act VI of 1887 (Companies Amendment) ... ... In Urdu. 3 p. (1 a.)
Act VII of 1887 (Suits' Valuation) ... ... In Urdu. 9 p. (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896 ... ... In Urdu. 2 a. 3 p (1 a.)
Ditto ditto ... In Nagri. 2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships) ... ... In Urdu. 1 a. 6 p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)... In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ... In Nagri. 1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... In Urdu. 3 a. 6 p. (1 a.)
Ditto ditto ... In Nagri 3 a. 6 p (1 a)
Act XV of 1887 (Burma Military Police), ... In Urdu. 9 p. (1 a.)
Ditto ditto ... In Nagri. 9 p. (1 a)
Act XVIII of 1887 (Allahabad University) ... . In Urdu. 1 a. (1 a)
Act III of 1888 (Police), as modified up to 1st March, 1893 ... ... In Urdu 6 p. (1 a)
Ditto (as passed) ... ... In Nagri. 6 p (1 a.)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893 In Urdu 3 p (1 a.)
Ditto (as passed) ... ... In Nagri. 3 p. (1. a)
Act V of 1888 (Inventions and Designs) ... ... In Urdu. 2 a. 3 p. (1 a.)
Act VI of 1888 (Debtors) ... ... In Urdu. 6 p. (1 a)
Ditto ... ... In Nagri. 6 p (1 a.)
Act VII of 1888 (Civil Procedure Amendment) ... ... In Urdu. 1 a. 9 p. (1 a)
Ditto ... ... In Nagri. 1 a. 9 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... In Urdu 6 p. (1 a)
Ditto ditto ... In Nagri. 6 p (1 a)
Act II of 1889 (Measures of Length) ... ... In Urdu. 3 p. (1 a.)
Ditto ... ... In Nagri. 3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904 In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ... In Nagri 2 a. (1 a.)
Act VI of 1889 (Probate and Administration) ... ... In Urdu. 6 p. (1 a.)
Ditto ... ... In Nagri 6 p. (1 a)
Act X of 1889 (Ports), as modified up to 1st June, 1894 ... ... In Urdu. 5 a. (2 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ... In Nagri. 3 a (1 a. p)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894 ... In Urdu. 9 p. (1 a.)
Ditto ditto ... In Nagri. 9 p. (1 a.)
Act XVI of 1889 (Central Provinces Land Revenue) ... In Urdu. 1 a. 6 p. (1 a.)
Ditto ... ... In Nagri 1 a. 6 p. (1 a.)
Act XX of 1889 (Lunatic Asylums Amendment) ... ... In Urdu. 3 p. (1 a)
Act I of 1890 (Revenue Recovery) ... ... In Urdu. 3 p. (1 a)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881) ... ... In Urdu. 3 p. (1 a)
Act V of 1890 (Indian Forest and Burma Forest Amendment) ... ... In Urdu. 6 p. (1 a.)
Act VI of 1890 (Charitable Endowments) ... ... In Urdu. 6 p. (1 a)
Act VIII of 1890 (Guardians and Wards) ... ... In Urdu. 2 a. 3 p (1 a. 9 p.
Act IX of 1890 (Railways), as modified up to 1st June, 1905 ... ... In Urdu. 8 a. (2 a)
Act IX of 1890 (Railways), as modified up to 1st May, 1896 ... ... In Nagri. 8 a. (2 a.)

Act IX of 1872 (Contract), as modified up to 1st September, 1899 ... In Nagri. 9 *a.* 6 *p.* (3 *a.*)
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ... In Urdu. 4 *a.* (2 *a.*)
Ditto ditto ... In Nagri. 4 *a.* (2 *a.*)
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 In Urdu. 9 *p.* (1 *a.*)
Ditto ditto ... In Nagri. 9 *p.* (1 *a.*)
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899 ... ... In Urdu. 3 *a.* 3 *p.* (1 *a.*)
Ditto ditto ... In Nagri. 3 *a.* 3 *p.* (1 *a.*)
Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... ... In Urdu. 9 *p.* (1 *a.*)
Ditto ditto ... In Nagri. 1 *a.* (1 *a.*)
Act IX of 1875 (Majority), as modified up to 1st May, 1906 ... ... In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ... ... In Nagri. 3 *p.* (1 *a.*)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... In Urdu. 4 *a.* 6 *p.* (1 *a.* 6 *p.*)
Ditto ditto ... In Nagri. 4 *a.* 3 *p* (1 *a.* 6 *p*)
Act III 1877 (Registration), as modified up to 1st December, 1896 ... In Urdu. 4 *a.* 3 *p.* (2 *a.*)
Ditto ditto ... In Nagri. 4 *a.* 6 *p.* (2 *a.*)
Act I of 1878 (Opium), as modified up to 1st December, 1896 ... In Nagri. 1 *a.* 6 *p* (1 *a.*)
Act VII of 1878 (Forests), as modified up to 1st December 1903 ... In Urdu. 4 *a.* (1 *a.* 6 *p.*)
Ditto ditto ... In Nagri. 3 *a.* 9 *p.* (1 *a.* 6 *p.*)
Act XI of 1878 (Arms), as modified up to 1st May, 1904 ... ... In Urdu. (2 *a.* (1 *a.*)
Ditto ditto ... ... In Nagri. 2 *a.* (1 *a*)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902 In Urdu. 2 *a* (1 *a*)
Ditto ditto ... In Nagri. 2 *a.* (1 *a.*)
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 In Urdu. 2 *a.* 6 *p.* (1 *a.*)
Ditto ditto ... In Nagri. 2 *a.* 6 *p.* (1 *a.*)
Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... In Urdu. 1 *a.* 6 *p* (1 *a.*)
Ditto ditto ... In Nagri. 1 *a.* 6 *p.* (1 *a.*)
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898 ... ... In Urdu. 9 *a.* (1 *a.* 6 *p.*)
Ditto ditto ... In Nagri. 9 *a.* (1 *a.* 6 *p.*)
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ... In Urdu. 6 *a.* 9 *p.* (2 *a.*)
Ditto Ditto ... In Nagri. 6 *a.* 9 *p.* (2 *a.*)
Act VI of 1882 (Companies), as modified up to 1st August, 1906 ... In Urdu. 13 *a.* 9 *p.* (3 *a.*)
Ditto ditto ... In Nagri. 14 *a.* (3 *a*)
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December 1899 ... ... In Urdu. Re. 1-4 (6 *a.*)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... ... In Urdu. 1 *a.* (1 *a.*)
Ditto ditto ... In Nagri. 1 *a.* (1 *a*)
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ... In Urdu. 4 *a.* 9 *p.* (1 *a.* 6 *p.*)
Ditto ditto ... In Nagri. 4 *a.* 6 *p.* (1 *a.* 6 *p*)
Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ... In Urdu. 1 *a.* 3 *p.* (1 *a*)
Ditto ditto ... In Nagri. 1 *a.* 3 *p.* (1 *a.*)
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ... In Urdu. 3 *a.* 6 *p.* (1 *a.* 6 *p*)
Ditto ditto ... In Nagri. 3 *a.* 6 *p.* (1 *a.* 6 *p*)
Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1906 In Urdu. 6 *p* (1 *a.*)
Ditto ditto ... In Nagri. 6 *p.* (1 *a.*)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899... In Urdu. 2 *a* 6 *p.* (1 *a.*)
Act II of 1885 (Negotiable Instruments Amendment). ... In Urdu. 9 *p.* (1 *a*)
Act III of 1885 (Transfer of Property Amendment) ... ... In Urdu. 3 *p.* (1 *a.*)
Act X of 1885 (Oudh Estates Amendment) ... ... In Urdu. 3 *p.* (1 *a.*)
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ... In Urdu. 1 *a.* 6 *p.* (1 *a*)
Act XXI of 1885 (Madras Civil Courts Amendment) ... ... In Urdu 3 *p.* (1 *a*)

Act II of 1886 (Income tax), as modified up to 1st April, 1903	In Urdu 3 a. (1 a. 9 p.)
Ditto ditto ...	In Nagri 3 a. (3 a. 9 p)
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu. 3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu. 1 a 3 p. (1 a)
Act VII of 1886 (Registration Amendments)	In Urdu. 3 p. (1 a)
Act X of 1886 (Criminal Law Amendment)	In Urdu. 9 p. (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act VI of 1887 (Companies Amendment)	In Urdu. 3 p. (1 a.)
Act VII of 1887 (Suits' Valuation)	In Urdu. 9 p (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu. 2 a. 3 p (1 a.)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships)	In Urdu. 1 a. 6 p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu. 3 a. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 6 p (1 a)
Act XV of 1887 (Burma Military Police), ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a)
Act XVIII of 1887 (Allahabad University)	In Urdu. 1 a. (1 a.)
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu 6 p. (1 a)
Ditto (as passed)	In Nagri. 6 p (1 a)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu. 3 p (1 a)
Ditto (as passed)	In Nagri. 3 p. (1. a)
Act V of 1888 (Inventions and Designs)	In Urdu. 2 a. 3 p. (1 a)
Act VI of 1888 (Debtors)	In Urdu. 6 p. (1 a)
Ditto	In Nagri. 6 p (1 a.)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu. 1 a. 9 p. (1 a)
Ditto	In Nagri. 1 a. 9 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	In Urdu 6 p. (1 a.)
Ditto ditto ...	In Nagri. 6 p (1 a)
Act II of 1889 (Measures of Length)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri 2 a. (1 a.)
Act VI of 1889 (Probate and Administration)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri 6 p. (1 a)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu. 5 a. (2 a)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri. 3 a (1 a. p)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894 ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVI of 1889 (Central Provinces Land Revenue) ...	In Urdu. 1 a. 6 p. (1 a.)
Ditto	In Nagri 1 a 6 p. (1 a.)
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu. 3 p. (1 a)
Act I of 1890 (Revenue Recovery)	In Urdu. 3 p. (1 a.)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu. 3 p (1 a)
Act V of 1890 (Indian Forest and Burma Forest Amendment) ...	Urdu. 6 p. (1 a.)
Act VI of 1890 (Charitable Endowments)	6 p. (1 a.)
Act VIII of 1890 (Guardians and Wards)	3 p (1 a. 9 p)
Act IX of 1890 (Railways), as modified up to 1st June, 1905 ...	(2 a)
Act IX of 1890 (Railways), as modified up to 1st May, 1896 ...	2 a)

Act X of 1890 (Press and Registration of Books Amendment) ... In Urdu. 3 *p.* (1 *a*)
Act XI of 1890 (Prevention of Cruelty to Animals) ... In Urdu. 3 *p.* (1 *a*)
Act XVIII of 1890 (Emigration Amendment) ... In Urdu 3 *p.* (1 *a*)
Act XIX of 1890 (Salt Amendment) ... In Urdu. 3 *p.* (1 *a*)
Act XX of 1890 (North-Western Provinces and Oudh) ... In Urdu. 1 *a.* (1 *a*)
Act V of 1891 (*Ports Act Amendment*) ... In Urdu 3 *p.* (1 *a*)
Act X of 1891 (Indian Criminal Law Amendment) ... In Urdu. 3 *p.* (1 *a*)
Act XIV of 1891 (*Oudh Courts*) ... In Urdu. 6 *p.* (1 *a*)
Act XVIII of 1891 (Bankers Books Evidence), as modified by Acts I of 1893 and XII of 1900 ... In Urdu. 3 *p.* (1 *a.*)
Ditto ditto ... In Nagri. 6 *p* (1 *a*)
Act II of 1892 (Christian Marriage Validation) ... In Urdu. 3 *p.* (1 *a.*)
Act IV of 1892 (Bengal Court of Wards Amendment) ... In Urdu. 6 *p.* (1 *a*)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ... In Urdu 3 *p.* (1 *a.*)
Act IV of 1893 (Partition) ... In Urdu. 3 *p.* (1 *a*)
Act I of 1894 (Land Acquisition) ... In Urdu. 2 *a.* 3 *p.* (1*a.* 6*p.*)
Ditto ... In Nagri. 1 *a.* 6 *p.* (1*a.* 6*p.*)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment) ... In Urdu. 3 *p.* (1 *a.*)
Act V of 1894 (Civil Procedure Code Amendment) ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... In Nagri 3 *p.* (1 *a.*)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ... In Urdu. 4 *a* (1 *a*)
Ditto ditto ... In Nagri. 3 *a* 3 *p.* (2 *a*)
Act IX of 1894 (Prisons) ... In Urdu. 1 *a.* 3 *p.* (1 *a.*)
Ditto ... In Nagri 2 *a.* 3 *p.* (1 *a.*)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment) ... In Urdu. 3 *p.* (1 *a*)
Ditto ditto ... In Nagri. 3 *p.* (1 *a.*)
Act XII of 1895 (Companies—Memorandum of Association) ... In Urdu. 3 *a.* (1 *a.*)
Act XIV of 1895 (Pilgrim Ships) ... In Urdu 1 *a.* 3 *p* (1 *a*)
Act II of 1896 (Cotton-duties) ... In Urdu 1 *a.* 3 *p.* (1 *a.*)
Ditto ... In Nagri. 1 *a.* (1 *a.*)
Act VI of 1896 (Indian Penal Code Amendment) ... In Urdu. 3 *p.* (1 *a*)
Act VIII of 1896 (Inland Bonded Warehouses) ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... In Nagri. 3 *p.* (1 *a*)
Act XII of 1896 (Excise), as modified up to 1st August 1905 ... In Nagri. 3 *a.* 3 *p.* (1 *a.*)
Act I of 1897 (Act XXXVII of 1850 Amendment) ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... In Nagri. 3 *p.* (1 *a*)
Act II of 1897 (Criminal Tribes Act Amendment) ... In Urdu 3 *p.* (1 *a.*)
Act III of 1897 (Epidemic Diseases) ... In Urdu. 3 *p.* (1 *a*)
Ditto ... In Nagri. 3 *p.* (1 *a.*)
Act IV of 1897 (Fisheries) ... In Urdu. 3 *p.* (1 *a.*)
Ditto ... In Nagri. 3 *p.* (1 *a*)
Act VI of 1897 (Negotiable Instruments Act Amendment) ... In Urdu. 3 *p.* (1 *a*)
Ditto ditto ... In Nagri 3 *p.* (1 *a*)
Act VII of 1897 (Indian Emigration Act Amendment) ... In Urdu 3 *p.* (1 *a*)
Ditto ditto ... In Nagri 9 *p* (1 *a*)
Act VIII of 1897 (Reformatory Schools) ... In Urdu. 3 *p* (1 *a*)
Ditto ... In Nagri 9 *p* (1 *a*)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... In Urdu. 9 *p* (1 *a*)
Ditto ditto ... In Nagri 9 *p.* (1 *a*)
Act X of 1897 (General Clauses) ... In Urdu 1 *a.* (1 *a.*)
Ditto ... In Nagri 1 *a* (1 *a*)
Act XII of 1897 (Local Authorities Emergency Loans) ... In Urdu 3 *p.* (1 *a.*)
Ditto ditto ... In Nagri. 3 *p.* (1 *a.*)
Act XV of 1897 (Cantonments) ... In Urdu. 3 *p.* (1 *a*)
Act I of 1898 [Stage-carriages Act (1861) Amendment] ... In Urdu. 3 *p.* (1 *a*)

Act I of 1898 [Stage Carriages Act (1861) Amendment] ... ... In Nagri. 3 p (1 a.)
Act III of 1898 (Lepers) ... ... In Urdu 6 p. 1 a)
Ditto ... ... In Nagri. 6 p. (1 a)
Act IV of 1898 (Indian Penal Code Amendment) ... . In Urdu 3 p (1 a)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1900 ... ... In Urdu. Re 1-4 (8 a)
Ditto ditto ... In Hindi. Re 1-6 (8 a.)
Act VI of 1898 (Post Office) ... ... In Urdu. 2 a (1 a.)
Ditto ... ... In Nagri. 2 a (1 a)
Act IX of 1898 (Live-stock Importation) ... ... In Urdu. 3 p. (1 a)
Ditto ... ... In Nagri. 3 p. (1 a)
Act X of 1898 (Indian Insolvency Rules) ... ... In Urdu. 3 p (1 a)
Act I of 1899 [Indian Marine Act (1887) Amendment] ... ... In Urdu. 6 p (1 a.)
Ditto ditto ... ... In Nagri. 6 p (1 a.)
Act II of 1899 (Stamp), as modified up to 31st August, 1905 ... ... In Urdu. 7 a. 6 p. (1a. 6p.)
Ditto ditto ... ... In Nagri 7 a. 6 p (1a. 6p.)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ... In Urdu. 2 a. 3 p (1 a)
Ditto ditto ... In Nagri. 2 a. 3 p. (1 a.)
Act IV of 1899 (Government Buildings) ... ... In Urdu. 3 p. (1 a.)
Ditto ... ... In Nagri. 3 p. (1 a.)
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment] ... In Urdu. 3 p. (1 a)
Ditto ditto ... In Nagri. 3 p. (1 a)
Act VIII of 1899 (Petroleum) ... ... In Urdu. 9 p. (1 a.)
Ditto ... ... In Nagri. 9 p. (1 a.)
Act IX of 1899 (Arbitration) ... ... In Urdu. 9 p. (1 a)
Ditto ... ... In Nagri. 9 p. (1 a.)
Act XI of 1899 (Court-fees Amendment) ... ... In Urdu. 9 p. (1 a.)
Ditto ... ... In Nagri. 6 p. (1 a)
Act XII of 1899 (Currency Notes Forgery) ... ... In Urdu. 3 p. (1 a.)
Ditto ... ... In Nagri. 3 p. (1 a.)
Act XIV of 1899 (Tariff Amendment) ... ... In Urdu. 3 p. (1 a.)
Ditto ... ... In Nagri. 3 p. (1 a)
Act XVII of 1899 (Indian Registration Amendment ... .. In Urdu. 3 p. (1 a.)
Ditto ditto ... ... In Nagri. 3 p. (1 a)
Act XVIII of 1899 (Land Improvement Loans Amendment) ... ... In Urdu. 3 p. (1 a)
Ditto ditto ... ... In Nagri. 3 p. (1 a.)
Act XX of 1899 (Presidency Banks) ... ... In Urdu. 3 p. (1 a.)
Ditto ... ... In Nagri. 3 p. (1 a)
Act XXI of 1899 (Central Provinces Tenancy Amendment) ... ... In Urdu. 3 p. (1 a.)
Ditto ditto ... ... In Nagri. 3 p. (1 a.)
Act XXIV of 1899 (Central Provinces Court of Wards) ... ... In Urdu. 1 a. 3 p. (1 a)
Ditto ditto ... ... In Nagri. 1 a. 3 p (1 a)
Act I of 1900 (Indian Articles of War Amendment) ... ... In Urdu. 3 p (1 a.)
Ditto ditto ... ... In Nagri. 3 p. (1 a)
Act IV of 1900 [Indian Companies (Branch Registers)] ... ... In Urdu. 3 p. (1 a.)
Ditto ditto ... ... In Nagri 3 p. (1 a.)
Act IX of 1900 (Amendment) of Court-fees Act, 1870) ... .. In Urdu. 3 p. (1 a.)
Ditto ditto ... ... In Nagri. 3 p. (1 a)
Act X of 1900 (Census) ... ... In Urdu. 9 p (1 a)
Ditto ... ... In Nagri. 9 p. (1 a)
Act II of 1901 [Indian Tolls (Army)] ... ... In Urdu. 6 p (1 a.)
Ditto ... ... In Nagri. 9 p. (1 a.)
Act III of 1901 (Indian Ports) ... ... In Urdu 3 p. (1 a)
Act V of 1901 [Indian Forest (Amendment)] ... ... In Urdu. 3 p. (1 a)
Ditto ... ... In Nagri. 3 p. (1 a
Act VI of 1901 (Assam Labour and Emigration) ... ... In Urdu. 5 a. (2

Act	Price
Act VI of 1901 (Assam Labour and Emigration)	... In Nagri. 5 a. (2 a)
Act VII of 1901 (Native Christian Administration of Estates)	... In Urdu. 3 p. (1 a.)
Ditto ditto	... In Nagri. 3 p. (1 a.)
Act VIII of 1901 (Mines)	... In Urdu. 1 a (1 a)
Ditto	... In Nagri. 1 a. (1 a)
Act IX of 1901	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act X of 1901	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act II of 1902 [Cantonments (House-Accommodation)] ...	... In Urdu. 1 a. (1 a.)
Ditto ditto ...	... In Nagri 1 a. (1 a)
Act IV of 1902 (Indian Tramways)	... In Urdu. 3 p (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act V of 1902 (Administrators General and Official Trustees) ...	... In Urdu. 3 p (1 a)
Ditto ditto ...	... In Nagri. 3 p (1 a)
Act VII of 1902 [United Provinces (Designation)] ...	... In Urdu. 3 p. (1 a)
Act VIII of 1903 (Indian Tariff)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p (1 a)
Act II of 1903 [Indian Post Office (Amendment)]	... In Urdu 3 p. (1 a.)
Ditto	... In Nagri. (3 p 1 a)
Act III of 1903 (Electricity)...	... In Urdu. 2a 6p (1 a 6 p.
Ditto	... In Nagri. 2a. 6p. (1 a 6 p)
Act V of 1903 (Ports)	... In Urdu. 3p. (1a) (2a 6p)
Ditto	... In Nagri 3 p. (1 a.)
Act VII of 1903 (Works of Defence)	... In Urdu. 1 a 3 p. (1 a)
Ditto	... In Nagri. 1 a. 3 p (1 a)
Act VIII of 1903 (Probate and Administration)	... In Urdu. 3 p. (1 a.)
Ditto	... In Nagri 1 a 3 p. (1 a)
Act IX of 1903 (Tea Cess)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p (1 a.)
Act X of 1903 (Victoria Memorial)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act XIII of 1903 (Lepers)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri 3 p. (1 a.)
Act XIV of 1903 (Indian Foreign Marriages)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	... In Urdu. 1 a. 9 p. (1 a)
Ditto ditto	... In Nagri. 1 a. 9 p (1 [illegible]
Act I of 1904 (Poisons)	... In Urdu. 6 p. (1 a.)
Ditto	... In Nagri. 6 p. (1 a.)
Act III of 1904 (Local Authorities Loan) ...	... In Urdu. 3 p (1 a.)
Ditto	. In Nagri. 3 p. (1 a.)
Act IV of 1904 (North-West Border Military Police) ...	.. In Urdu. 9 p. (1 a.)
Act VI of 1904 [Transfer of Property (Amendment)] ...	... In Urdu. 3 p (1 a)
Ditto ditto ...	... In Nagri. 3 p. (1 a)
Act VII of 1904 (Ancient Monuments Preservation) ...	... In Urdu. 9 p. (1 a)
Ditto ditto ...	... In Nagri. 9 p. (1 a)
Act VIII of 1904 (Indian Universities)	... In Urdu. 1 a. 3 p. (1 a
Ditto	... In Nagri. 1 a. 3 p (1 a
Act X of 1904 (Co-operative Credit Societies)	... In Urdu. 1 a. (1 a.)
Ditto	... In Nagri. 1 a. (1 a)
Act XI of 1904 to revive and continue section 8 B of the Indian Tariff Act, 1894	... In Urdu. 3 p (1 a.)
Ditto Ditto	... In Nagri. 3 p. (1 a)
Act XII of 1904 (Emigration)	... In Urdu 3 p. (1 a.)
Ditto	... In Nagri. 3 p (1 a)

Act XIII of 1904 (Indian Articles of War)	... In Urdu.	3 p. (1 a.)
Ditto	... In Nagri.	3 p. (1 a.)
Act XV of 1904 [Indian Stamp (Amendment)]	... In Urdu.	3 p. (1 a.)
Ditto	... In Nagri.	3 p. (1 a.)
Act I of 1905 [Local Authorities Loan (Amendment)] ...	... In Urdu.	3 p. (1 a.)
Ditto ditto ...	... In Nagri.	3 p. (1 a.)
Act II of 1905 [Indian Universities (Validation)] ...	... In Urdu.	3 p. (1 a.)
Ditto ditto ...	... In Nagri.	3 p. (1 a.)
Act III of 1905 (Indian Paper Currency)	... In Urdu.	9 p. (1 a.)
Ditto	... In Nagri.	9 p. (1 a.)
Act IV of 1905 (Indian Railway Board)	... In Urdu.	3 p. (1 a.)
Act VI of 1905 (Court-fees (Amendment)	... In Urdu.	1 a. 6 p. (1 a.)
Ditto	... In Nagri.	3 p. (1 a.)
Act VII of 1905 (Bengal and Assam Laws)	... In Urdu.	3 p. (1 a.)
Ditto	... In Nagri.	3 p. (1 a.)
Regulation I of 1890 (British Baluchistan Laws)	... In Urdu.	2 a. (1 a. 9 p.)
Regulation V of 1890 (British Baluchistan Forests) ...	... In Urdu.	2 a. (1 a. 6 p.)
Regulation VI of 1893 (Hazara Forests)	... In Urdu	2 a. (1 a. 6 p.)
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Act VI of 1901 (Assam Labour and Emigration)	In Nagri. 5 a. (2 a.)
Act VII of 1901 (Native Christian Administration of Estates) ...	In Urdu. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 p (1 a.)
Act VIII of 1901 (Mines)	In Urdu. 1 a (1 a)
Ditto	In Nagri. 1 a (1 a)
Act IX of 1901	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p. (1 a)
Act X of 1901	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p. (1 a)
Act II of 1902 [Cantonments (House-Accommodation)]	In Urdu. 1 a (1 a.)
Ditto ditto	In Nagri 1 a. (1 a)
Act IV of 1902 (Indian Tramways)	In Urdu. 3 p (1 a)
Ditto	In Nagri. 3 p. (1 a)
Act V of 1902 (Administrators General and Official Trustees)	In Urdu. 3 p (1 a)
Ditto ditto	In Nagri. 3 p. (1 a)
Act VII of 1902 [United Provinces (Designation)]	In Urdu. 3 p (1 a)
Act VIII of 1902 (Indian Tariff)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p (1 a)
Act II of 1903 [Indian Post Office (Amendment)]	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. (3 p 1 a)
Act III of 1903 (Electricity)	In Urdu. 2 a 6 p. (1 a 6 p.
Ditto	In Nagri. 2 a. 6 p. (1 a. 6 p)
Act V of 1903 (Ports)	In Urdu. 3 p (1 a) (2 a 6 p)
Ditto	In Nagri 3 p (1 a)
Act VII of 1903 (Works of Defence)	In Urdu. 1 a 3 p. (1 a)
Ditto	In Nagri. 1 a. 3 p (1 a)
Act VIII of 1903 (Probate and Administration)	In Urdu. 3 p (1 a.)
Ditto	In Nagri 1 a 3 p. (1 a)
Act IX of 1903 (Tea Cess)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p (1 a.)
Act X of 1903 (Victoria Memorial)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p. (1 a)
Act XIII of 1903 (Lepers)	In Urdu. 3 p. (1 a)
Ditto	In Nagri 3 p. (1 a.)
Act XIV of 1903 (Indian Foreign Marriages)	In Urdu. 3 p. (1 a)
Ditto	In Nagri. 3 p. (1 a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ...	In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. 9 p (1 a.)
Act I of 1904 (Poisons)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act III of 1904 (Local Authorities Loan)	In Urdu. 3 p (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act IV of 1904 (North-West Border Military Police)	In Urdu. 9 p. (1 a.)
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu. 3 p. (1 a)
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Act VII of 1904 (Ancient Monuments Preservation)	In Urdu. 9 p. (1 a)
Ditto ditto	In Nagri. 9 p. (1 a)
Act VIII of 1904 (Indian Universities)	In Urdu. 1 a. 3 p. (1 a)
Ditto	In Nagri. 1 a. 3 p. (1 a)
Act X of 1904 (Co-operative Credit Societies)	In Urdu. 1 a. (1 a)
Ditto	In Nagri. 1 a (1 a.)
Act XI of 1904 to revise and continue section 8B of the Indian Tariff Act, 1894	In Urdu. 3 p (1 a.)
Ditto Ditto	In Nagri. 3 p. (1 a.)
Act XII of 1904 (Emigration)	In Urdu. 3 p. (1 a)
... ...	In Nagri. 3 p (1 a.)

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Addenda and Corrigenda List No. I of 1905 to the above	...	...	2 *a* 6 *p*. (1 *a*.)
Index to Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895	...	...	7 *a*. (2 *a*.)
Ditto ditto	...	In Urdu and Nagri.	7 *a*. (2 *a*.)
Contents to ditto ditto	...	In Urdu and Nagri.	1 *a*. 9 *p*. (1 *a*.)
The Baluchistan Agency Forest Law, 1890	...	In Urdu ...	2 *a*. (1 *a* 6 *p*)
The Quetta Municipal Law, 1896 ...	...	In Urdu ...	3 *a*. 8 *p*. (1 *a*. 6 *p*.)
The Baluchistan Agency Criminal Justice Law, 1896	...	In Urdu ...	9 *p*. (1 *a*.)
The Baluchistan Agency Civil Justice Law, 1896	...	In Urdu ...	2 *a*. 6 *p*. (1 *a*.)

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TABLE OF CASES CITED.

INDEX.

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage

So *held by* STANLEY, C.J., KNOX, J. and AIKMAN, J., concurring.

A mortgage of joint family property was executed by the father of a joint Hindu family who had sons living at the time. The mortgage was for valuable consideration but it was not shown that it was executed to meet any antecedent debt or for any family necessity, on the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality.

Held by STANLEY, C. J., and KNOX and AIKMAN, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BANERJI, J. RICHARDS, J., concurring :—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son

-ty made by the father
and his interest in the
rtgage was incurred at
. some date anterior to
.t against the son to enforce
.intiff to prove that the debt
mily, but it is for the son to
: the debt, it was not his

The following cases were referred to :—*Debi Dat* v. *Jadu Rai*, I. L. R , 24 All , 459, *Jamna* v. *Nain Sukh*, I. L. R., 9 All , 493, *Badri Prasad* v. *Madan Lal*, I. L. R , 15 All , 75, *Lal Singh* v. *Deo Narain Singh*, I. L. R , 8 All., 279, *Manbahal* v. *Gopal Misra*, Weekly Notes, 1901, p. 57, *Haruman Kamat* v. *Daulat Mundar*, I. L. R. 10 Calc., 525, *Ram Dayal* v. *Ajudhia Prasad*, I. L. R., 28 All., 328, *Surja Prasad* v. *Golab Chand*, I. L. R., 27 Calc., 762,

committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff's claim as against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff's claim against the other defendants could not be sustained. Reliance was placed upon the leading case of *Brinsmead* v. *Harrison* (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of *Brinsmead* v. *Harrison*, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit

(1) (1872) L. R., 7 C. P., 547.

1909

RAM KUMAR SINGH v. ALI HUSAIN.

and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for the appellants is the case of *Thurman* v. *Wild* (1). This case does not appear to us to assist the appellants. In it an action was brought for damages for a trespass committed by the defendant as servant and by command of his master. It was held that the acceptance of satisfaction by the plaintiff from the master was a good defence to an action against the servant. The ground upon which this decision was arrived at is to be found in the judgment of LORD DENMAN at page 461 of the report. The passage runs as follows:—"He (*i. e.* the plaintiff) has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties, and whether this was rendered with or without the consent of some of them he is equally barred as against all." The ground, therefore, of this decision was that the plaintiff had accepted complete redress from one of two joint tort-feasors, and having done so he could not sustain a suit against the others. As LORD DENMAN says:—"He had accepted a compensation for the whole trespass and in discharge of all parties." We think under the circumstances that the learned Judge of this Court was perfectly right in dismissing the appeal to him and we accordingly dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

1909. *March* 5.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Richards.

CHANDRADEO SINGH AND OTHERS (DEFENDANTS) APPELLANTS *v.* MATA PRASAD AND ANOTHER (PLAINTIFFS) AND SHEO BABU SINGH AND OTHERS (DEFENDANTS) RESPONDENTS.*

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

* Second Appeal No. 1028 of 1907.

(1) (1840) 11 A. & E., 453.

A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage was taken to satisfy an antecedent debt or was justified by some family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt.

So *held* by STANLEY, C.J., KNOX, J., and AIKMAN, J., concurring.

A mortgage of joint family property was executed by the father of a joint Hindu family who had sons living at the time. The mortgage was for valuable consideration but it was not shown that it was executed to meet any antecedent debt or for any family necessity. On the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality.

Held by STANLEY, C. J., and KNOX and AIKMAN, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BANERJI, J, RICHARDS, J, concurring .—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage. In a suit brought against the son to enforce the mortgage the onus is not on the plaintiff to prove that the debt was incurred for the benefit of the family, but it is for the son to prove that, having regard to the nature of the debt, it was not his pious duty to discharge it.

The following cases were referred to :—*Debi Dat* v. *Jadu Rai* (1), *Jamna* v. *Nain Sukh* (2), *Badri Prasad* v. *Madan Lal* (3), *Lal Singh* v. *Deo Narain Singh* (4), *Manbahal* v. *Gopal Misra* (5), *Hanuman Kamat* v. *Daulat Mundar* (6), *Ram Dayal* v. *Ajudhia Prasad* (7), *Surja Prasad* v. *Golab Chand* (8), *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (9), *Suraj Bansi Koer* v. *Sheo Parshad Singh* (10), *Babu Singh* v. *Behari Lal* (11), *Karan Singh* v. *Bhup Singh* (12), *Girdharee Lal* v. *Kantoo Lal* (13), *Nanomi Babuasin* v. *Modhun Mohun* (14), *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (15), *Kameswar Pershad* v. *Run Bahadur Singh* (16), *Maharaj Singh* v. *Balwant Singh* (17), *Jamsetjhi N. Tata* v. *Kashinath Jivan Manglia* (18), *Chidambara Mudaliar* v. *Koothaperumal* (19), *Sami Ayyangar* v. *Ponnamal* (20),

(1) (1902) 24 All. 459.
(2) (1887) I. L. R., 9 All., 493.
(3) (1893) I. L. R., 15 All., 75.
(4) (1886) I. L. R., 8 All., 279.
(5) Weekly Notes, 1901, p. 57.
(6) (1881) I. L. R., 10 Calc., 525.
(7) (1905) I. L. R., 28 All., 328.
(8) (1900) I. L. R., 27 Calc., 762.
(9) (1905) I. L. R., 29 Mad., 200.
(10) (1878) I. L. R., 5 Calc., 148; s. c., L. R., 6 I. A., 88
(11) (1908) I. L. R., 30 All., 156.
(12) (1904) I. L. R., 27 All., 16.
(13) (1874) L. R., 1 I. A., 321.
(14) (1885) L. R., 13 I. A., 1; s. c., I. L. R., 13 Calc., 21.
(15) (1856) 6 Moo. I. A., 393.
(16) (1880) I. L. R., 6 Calc., 843.
(17) (1905) I. L. R., 28 All., 508.
(18) (1901) I. L. R., 26 Bom., 326.
(19) (1903) I. L. R., 27 Mad., 326.
(20) (1897) I. L. R., 21 Mad., 28.

1909

RAM KUMAR SINGH v. ALI HUSAIN.

and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for the appellants is the case of *Thurman* v. *Wild* (1). This case does not appear to us to assist the appellants. In it an action was brought for damages for a trespass committed by the defendant as servant and by command of his master. It was held that the acceptance of satisfaction by the plaintiff from the master was a good defence to an action against the servant. The ground upon which this decision was arrived at is to be found in the judgment of LORD DENMAN at page 461 of the report. The passage runs as follows:—"He (*i. e.* the plaintiff) has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties, and whether this was rendered with or without the consent of some of them he is equally barred as against all." The ground, therefore, of this decision was that the plaintiff had accepted complete redress from one of two joint tort-feasors, and having done so he could not sustain a suit against the others. As LORD DENMAN says:—"He had accepted a compensation for the whole trespass and in discharge of all parties." We think under the circumstances that the learned Judge of this Court was perfectly right in dismissing the appeal to him and we accordingly dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

1909. *March 5.*

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Richards.

CHANDRADEO SINGH AND OTHERS (DEFENDANTS) APPELLANTS *v.* MATA PRASAD AND ANOTHER (PLAINTIFFS) AND SHEO BABU SINGH AND OTHERS (DEFENDANTS) RESPONDENTS.*

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

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that the father in a joint Hindu family can mortgage family property, there being no legal necessity shown for the mortgage. The limitation prescribed by law for recovery from the sons of a debt due by a Hindu father is six years. See article 120 of the Limitation Act, No. XV of 1877 and the case of *Narsing Misra* v. *Lalji Misra*, (1). If, therefore, the appellants are right in contending that a Hindu father, in the absence of legal necessity, has no power to mortgage or sell ancestral family property, any claim to recover the amount from the sons *quâ* debt is barred by limitation

For the decision of this case two principles of Hindu law require consideration. The first is that Hindu sons are under a pious liability to pay their father's debts, if not tainted with immorality. The second is that a Hindu father has no higher powers than any other member of a joint co-parcenary body. These are two distinct principles and in no way dependent upon each other. The first principle, that of the pious liability is not involved in this case and is fully admitted by the appellants. The second principle is still good law and has not been departed from in subsequent decisions. When a person under a disability creates a charge (a Hindu father is under such a disability), it is for the person enforcing a charge so created to prove that the person who created the charge was acting within his powers. In the present case, therefore, the burden lies upon the plaintiffs-mortgagees to prove that the money was borrowed for a legal necessity or to liquidate an antecedent debt. The expression "antecedent debt" nowhere occurs in the Hindu Law. The earliest cases before the Privy Council, on this branch of Hindu law, were the cases of *Girdharee Lal* v. *Kantoo Lal* (2), and *Suraj Bansi Koer* v. *Sheo Purshad Singh* (3) In those cases fathers of Hindu families had become indebted. Being pressed by their creditors they had executed mortgages of ancestral property. Suits had been brought on those mortgages, decrees obtained against the fathers, and sales had taken place in execution. After sales in execution, sons had brought suits to recover their shares in the property sold. Their lordships of the Privy Council held that "where joint ancestral property has passed out

(1) (1901) I. L. R., 23 All., 206. (2) (1874) L. R., 1 I. A., 321.
(3) (1899) L. R. 6 I. A., 88.

1909

CHANDRADEO SINGH v. MATA PRASAD.

of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a father's debts, his sons by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes." In other words, they laid down that a Hindu father to liquidate his antecedent debts could mortgage and sell joint family property and that such payment came within the expression "pious purpose."

He submitted that these cases did not in any way enlarge the father's powers.

The lower courts relied on *Debi Dat* v. *Jadu Rai* (1). That case it was submitted was not rightly decided. In *Manbahal Rai* v. *Gopal Misra* (2), it was held that when a father executed a sale-deed of the family property for his own debt and not for a legal necessity or to pay off an antecedent debt, the sale was not binding on the sons. In *Kallu* v. *Fateh* (3), the same view was taken as in *Debi Dat* v. *Jadu Rai*, but the case of *Manbahal Rai* v. *Gopal Misra* was not considered. In the later case of *Ram Dial* v. *Ajudhia Prasad* (4) *Manbahal Rai* v. *Gopal Misra* was followed.

The Full Bench case, *Karan Singh* v. *Bhup Singh* (5), was not a case of mortgage but of a simple money debt. The difference is this. In the one case the father is contracting a debt, in the other he is hypothecating family property which he cannot do.

The *Mitakshara* lays down that the father in a joint Hindu family has no higher powers of alienation than any other member. (*Mitakshara*, chapter 1, section 1, verses 27, 28) When a son claims exemption on the ground of the immoral nature of the debt, it is for him to prove the immorality, but the creditor had first to prove that a transfer was made for a legal necessity or to pay off an antecedent debt.

The case of *Nanomi Babuasin* v. *Modhun Mohan* (6), relied upon in *Debi Dat* v. *Jadu Rai* was not a case of a mortgage at

(1) (1902) I. L. R., 24 All., 459.
(2) Weekly Notes, 1901, p. 57.
(3) (1904) I A. L. J. R., 316.
(4) (1906) I L. R., 28 All., 328.
(5) (1904) I. L. R., 27 All., 16.
(6) (1885) L. R., 13 I. A., 1: I. L. R., 13 Calc., 21.

all but one of debt. Therefore the question could not arise in that case and the observations of their Lordships were *obiter*.

There is a conflict of opinion not only in this High Court but in the other High Courts as well. The following cases were referred to:—*Bhek Narain Singh* v. *Januk Singh* (1), *Luchmun Das* v. *Giridhur Chowdhry* (2), *Laljee Sahay* v. *Fakeer Chand* (3), *Hanuman Kamat* v. *Dowlat Mundar* (4), *Khalilul-Rahman* v. *Govind Pershad* (5), *Surja Prasad* v. *Golab Chand* (6), *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (7), *Maheswar Dutt Tewari* v. *Kishun Singh* (8), *Chintamanrav Mehendale* v. *Kashinath* (9), *Jamsetji N. Tata* v. *Kashinath Jiwan* (10), *Ningareddi* v. *Lakshmana* (11), *Sami Ayyangar* v. *Ponnamal* (12), *Chidambara Mudaliar* v. *Koothaperumal* (13), *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (14), *Hanuman Singh* v. *Nanak Chand*, (15), *Jamna* v. *Nain Sukh* (16), *Badri Prasad* v. *Madan Lal* (17), *Maharaj Singh* v. *Balwant Singh* (18).

In all cases before the Privy Council from 6 I. A. onwards the suit had been brought after the property had been sold in execution of a decree.

The general principle of Hindu law is that every member of a joint Hindu family stands on an equal footing with and has the same powers as the others. The Privy Council have guarded this principle of Hindu law with great jealousy. *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (19), *Madho Parshad* v. *Mehrban Singh* (20), and *Balgovind Das* v. *Narain Lal* (21).

In the case of father and son the Privy Council safe-guarded this principle by the theory of antecedent debt and in the case of others by holding that no member can transfer even his own share without the consent of others, although at the suit of a creditor they allow such undivided share to be attached and sold.

(1) (1877) I.L.R., 2 Cal, 438
(2) (1880) I L R., 5 Calc., 855.
(3) (1880) I L R., 6 Calc, 135
(4) (1884) I L.R, 10 Calc., 528.
(5) (1892) I.L.R. 20 Calc, 328.
(6) (1900) I L R., 27 Calc., 762.
(7) (1907) I.L R, 34 Calc, 735.
(8) (1907) I L R., 34 Calc, 184
(9) (1889) I.L R, 14 Bom, 320.
(10) (1901) I.L.R., 26 Bom, 326.
(11) (1901) I L R, 26 Bom, 163 at pp 168-169.
(12) (1897) I. L R, 21 Mad, 28.
(13) (1903) I L R, 27 Mad, 326.
(14) (1905) I. L. R, 29 Mad, 200.
(15) (1884) I L R., 6 All, 193.
(16) (1887) I L. R., 9 All, 493.
(17) (1893) I L R., 15 All, 75. F B.
(18) (1906) I. L R, 28 All, 508.
(19) (1880) L. R, 7 I A., 181, 195.
(20) (1890) L. R, 17 I. A., 194.
(21) (1893) L. R, 20 I. A., 116.

of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a father's debts, his sons by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes." In other words, they laid down that a Hindu father to liquidate his antecedent debts could mortgage and sell joint family property and that such payment came within the expression "pious purpose."

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(3) (1904) 1 A. L. J. R., 316.
(4) (1906) I. L. R., 28 All., 328.
(5) (1904) I. L. R. 27 All., 16.
(6) (1885) L. R., 13 I. A., 1. I. L. R., 13 Calc., 21.

Ramchandra Mahadev Nadgir v. *Fakirappa* (1), and *Govindkrishna Gujar* v. *Sakharam Narayan* (2) were referred to.

The rulings of the Allahabad High Court also have been, except for two decisions and an *obiter dictum*, uniformly in favour of the creditor, irrespective of the fact whether he comes as a plaintiff or as a defendant. *Sita Ram* v. *Zalim Singh* (3), *Kishan Lal* v. *Garuruddhwaja* (4), *Debi Dat* v. *Jadu Rai* (5), *Kallu* v. *Fateh* (6), and *Babu Singh* v. *Behari Lal* (7). The only direct ruling against the respondent is, *Jamna* v. *Nain Sukh* (8). In this case it was held that the *onus* of proving legal necessity lay upon the creditor. This case was decided on the strength of *Lal Singh* v. *Deo Narain Singh* (9). But the judgment in that case was disavowed in a later case, *Bhawani Bakhsh* v. *Ram Dai* (10), by the judges who delivered the former judgment. Therefore the judgment in 9 All., 493, being based on 8 All., 279, is, it was submitted, incorrect.

In *Manbahal Rai* v. *Gopal Misra* (11), the remarks made with regard to antecedent debts were not necessary for the decision of the case. There is a passage in *Karan Singh* v. *Bhup Singh* (12), which taken by itself is in favour of the respondent. The passage includes mortgage debts as well as simple money debts.

As to *Maharaj Singh* v. *Balwant Singh* (13), the remarks in it as to the burden of proof being on the creditor were not necessary for the decision of the case. The immoral nature of the debt was proved in this case and the question did not, therefore, arise at all as to whether the burden of proving legal necessity lay on the creditor: *Basa Mal* v. *Maharaj Singh* (14), *Beni Madho* v. *Basdeo Pathak* (15), *Bhawani Bakhsh* v. *Ram Dai* (16), *Pem Singh* v. *Partab Singh* (17), and *Lal Singh* v. *Pulandar Singh* (18), were referred to and it was urged that

(1) (1900) 2 Bom., L R., 450.
(2) (1904) I.L.R., 28 Bom., 383, 389.
(3) (1886) I.L.R., 8 All., 233.
(4) (1899) I L R., 21 All, 238.
(5) (1902) I.L R., 24 All., 459.
(6) (1904) I.A.L.J R., 316.
(7) (1908) 5 A.L J.R, 175.
(8) (1887) I.L.R., 9 All., 493.
(9) (1886) I. L. R, 8 All, 279.
(10) (1891) I. L R, 13 All, 216.
(11) Weekly Notes 1901, p. 57.
(12) (1904) I.L.R., 27 All., 16, 18.
(13) (1906) I. L. R, 28 All., 508.
(14) (1886) I. L. R., 8 All. 205.
(15) (1890) I. L. R., 12 All., 99.
(16) (1891) I. L. R, 13 All., 316.
(17) (1892) I. L. R., 14 All., 179.
(18) (1905) I. L. R., 28 All, 182.

1909

CHANDRADEO SINGH v. MATA PRASAD.

in *Girdharee Lal* v. *Kantoo Lal* (1), their Lordships of the Privy Council were in doubt as to whether sons could question alienations made by the father, except on the ground of immorality, but in the later case of *Nanomi Babuasin* v. *Modhun Mohun* (2), their Lordships held that sons could not set up their right against the remedies of the creditor. This High Court has made observations on this ruling favourable to the creditor in *Lachman Das* v. *Khunnu Lal* (3) and *Karan Singh* v. *Bhup Singh* (4). The Privy Council clearly lay down in 13 Calc., 21, that a creditor can pursue any remedies open to him against the son which he could have pursued against the father unless the debt is tainted with immorality. This view has been followed in *Bhagbut Pershad Singh* v. *Girja Koer* (5) and *Mahabir Pershad* v. *Maheswar Nath Sahai* (6).

It was submitted that from 1836 to 1908 there was a uniformity of decisions in this High Court that the *onus* lay on the son. The principle of *stare decisis* should not be departed from.

Munshi *Gokul Prasad*, in reply referred to the principle of Hindu law that no member of a joint Hindu family can alienate family property without necessity. *Balgobind Das* v. *Narain Lal* (7). *Mitakshara*, Chapter I, section 1, verses 27, 28. The power of the father is not greater than that of any other member except that he is the natural manager of the family and that sons have a pious duty to pay the debts of their father. The reason why the father is unable to transfer family property is given by the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (8).

The power of the father to alienate family property should not be confused with the liabilities of the sons to pay their father's debts. The Privy Council have applied two different rules of evidence to the two classes of cases, *viz.*, those in which a creditor sues to enforce a charge against joint family property created by a Hindu father who has only a limited power of disposal, and those in which the sons come in as *plaintiffs* to set aside sales in execution of decrees obtained against the father.

(1) (1874) L. R., 1 I. A., 321.
(2) (1885) I. L. R., 13 Calc., 21, P. C.
(3) (1896) I. L. R., 19 All., 26, 31, F. B.
(4) (1904) I. L. R., 27 All., 16, 18, F. B.
(5) (1888) I. L. R., 15 Calc., 17, P. C.
(6) (1889) I. L. R., 17 Calc., 584, P. C.
(7) (1893) I. L. R., 15 All., 339, P. C.
(8) (1888) I. L. R., 10 All., 272, 286.

In the former class of cases they have applied the general rule that a plaintiff seeking to enforce a charge created by a person with limited powers must show that under the circumstances that person was competent to charge the property. This general rule is laid down in the well-known case of *Hanoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1). The same rule has been applied to cases of transfers by a father where in derogation of the rights of his son, under the *Mitakshara*, he has made an alienation of the family property. *Kameshwar Pershad* v. *Run Bahadur Singh* (2). In the latter class of cases they have applied the rule that when the sons sue to recover property which has passed out of the family by sale in execution of a decree obtained against the father, they must prove that the sale took place under such circumstances that they were not bound by it. The Privy Council case in I. L. R., 13 Calc, 21, is a case of that kind. In *Nanomi Babuasin* v. *Modhun Mohun* (3) the Privy Council never said that the sons could not plead limitation; what they said was that sons could not set up their right against the remedies of the creditor, but that implies that there must be in existence some remedies open to the creditor and not barred by time.

As regards the meaning of the phrase 'antecedent debt' it has been held by this court that antecedent debt means a debt contracted before the sale or the mortgage sought to be set aside by the son, and other courts have, in many cases, expressed the same view. The cases of *Lal Singh* v. *Deo Narain Singh* (4), *Manbahal Rai* v. *Gopal Misra* (5), *Ram Dayal* v. *Ajudhia Prasad* (6), *Hanuman Kamat* v. *Daulat Mundar* (7), *Surju Prasad* v. *Gulab Chand* (8), *Chinnayya* v. *Perumal* (9), *Sami Ayyangar* v. *Ponnammal* (10), and *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (11) were referred to.

The following judgments were delivered:

STANLEY, C.J.—This second appeal was directed to be laid before a Full Bench in consequence of a conflict in the decisions

(1) (1856) 6 Moo. I. A., 393, 418-9.
(2) (1880) I. L. R., 6 Calc., 843, 847-8.
(3) (1885) I. L. R., 13 Calc., 21.
(4) (1885) I. L. R., 8 All., 279.
(5) (1901) A. W. N., 57.
(6) (1906) I. L. R., 28 All., 323.
(7) (1884) I. L. R., 10 Calc., 528.
(8) (1900) I. L. R., 27 Calc., 762.
(9) (1889) I. L. R., 13 Mad., 51.
(10) (1897) I. L. R., 21 Mad., 28
(11) (1905) I. L. R., 29 Mad., 200.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

of this and the other High Courts upon the main question involved in it. The suit is one to enforce payment of a mortgage by sale of the mortgaged property. The mortgage was executed by the late Ram Narain Singh, who was the head of the defendants' family on the 4th of September 1883 to secure a principal sum of Rs. 400 in favour of Ram Narain Kalwar, the father of the plaintiff respondent Sheo Babu Singh and the grandfather of the appellant Chanderdeo Singh. The parties are governed by the law of the Mitakshara. It was found by the Court of first instance that the mortgage was not executed for the purpose of satisfying any antecedent debt and there was no evidence that the consideration was required for the legal necessities of the family, or that the lender made any inquiry as to the purposes for which the money was borrowed. On the other hand it was not proved, or even alleged, that the debt was tainted with immorality. On these findings the court mainly relying on the decision in the case of *Debi Dat* v. *Jadu Rai* (1), decreed the plaintiffs' claim. Upon appeal this decision was upheld by the learned officiating District Judge. He held that the money advanced to the mortgagor could not be said to have been applied to the discharge of any antecedent debt, but at the same time that the debt was not tainted with immorality and consequently the appeal was without any force. A second appeal was preferred, the first ground of appeal being that the mortgage not being one for the payment of an antecedent debt, nor for family necessity, was not binding on the appellants. There is a second ground of appeal, namely, that the claim of the plaintiffs so far as it is based on the poius duty of sons to pay their fathers' debt is barred by time. In view of the pious obligation of Hindu sons in a Mitakshara family to pay their father's debts, the learned counsel for the appellants did not for a moment contend that this pious duty did not lie upon his clients. He admitted that they were so liable, but he contended that the mortgage of the 4th of September 1883, not having been made to satisfy an antecedent debt, or for family necessities, was not binding upon the

(1) (1902) I. L. R., 24 All., 459.

appellants. The sole question then for the court is whether a father of a Hindu family governed by the Mitakshara law, can execute a mortgage which will be binding upon his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

The rule of the Mitakshara is to be found in Chapter I, section 1, clause 27. Clause 27 runs as follows:—Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father, or other predecessor; since it is ordained though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten and they who are yet still in the womb require the means of support, no gift or sale should therefore be made," and then follows *in clause 28 an exception to this rule. It runs as* follows:—"Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress for the sake of the family, and especially for pious purposes." This means, I take it that a donation, mortgage or sale cannot be made except *for the purposes named or one of them.* This is the foundation of all the decisions governing the competency of a Hindu father in a family governed by the Mitakshara to dispose of the joint property of the family. He can dispose of it during a season of distress, for the sake of the family or for pious purpose.

Until recently the decision of this High Court in the case of *Jamna* v. *Nain Sukh* (1) *was regarded as a binding ruling.* In that case Sir John Edge, C. J., and Mahmood, J, held that as a general rule a creditor endeavouring to enforce his claim under an hypothecation bond given by a Hindu father against the estate of

(1) (1887) I. L. R. 9 All., 493.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C J.

a joint Hindu family in respect of money lent or advanced to the father, should prove either that the money was obtained by the father for a legal necessity, or that he (the creditor) made such responsible enquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family. In that case in a suit against the members of a joint Hindu family upon a bond given by their father by which family property was hypothecated no evidence was given on either side, as here, as to the circumstances under which the bond was given. It was held that the burden of proof lay upon the plaintiff to show that either the money was obtained for legal necessity or that he had made reasonable inquiries and had obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family.

In the case of *Badri Prasad* v. *Madan Lal* (1), a Full Bench of this Court consisting of all the Judges held that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the birth of the sons, which purported to mortgage the joint family property, *the consideration having been money advances antecedently made* by the mortgagee to the father, not as manager of the family, or with the authority of the sons, or for family purposes, but not for purposes of immorality or for purposes which if the father were dead would exonerate the sons from the pious obligation of paying such debts of the father. In this case, as appears from the judgment of Edge, C. J., the consideration for the bond in suit was a sum of Rs. 1,457-3-0 due under a prior bond of the 7th of October 1881, Rs. 181-4-0 interest due under this bond and a present advance of Rs. 11-9-0. The money was borrowed to pay off an antecedent debt. The present advance of Rs. 11-9-0 being regarded as a negligible quantity. The decision therefore gives no support to the contention of the respondents.

In the case of *Manbahal Rai* v. *Gopal Misra* (2) Sir Arthur Strachey, C.J., and my brother Banerji expressed the view that a sale of ancestral property by a father in a joint Hindu family

(1) (1893) I. L. R., 15 All., 75. (2) Weekly Notes 1901, p. 57.

may be set aside on suit by the sons so far as it affected their interest in the property if there were no *antecedent debt* or valid necessity to support it, although the transaction was not shown to be tainted with immorality. In his judgment Sir Arthur Strachey, C.J., commenting upon the view expressed by the learned Judge of this Court from whose decision the appeal had been preferred observed as follows :—"The learned Judge held that the plaintiff was entitled to no relief whatever, inasmuch as he was "a Hindu son impeaching the sale of ancestral property of a joint family made by his father" and it had been "constantly held that when the vendor is the father in a joint family the son can impeach the sale only on the ground that the money was raised for debauchery and other immoral purposes." In my opinion that proposition is too broadly laid down by the learned Judge. The doctrine limiting the son's power to impeach an alienation of joint family property made by his father is based solely on the pious duty which the Hindu law recognises as incumbent upon a son to pay his father's debts not tainted with immorality. The true rule is that the son cannot impeach an alienation of ancestral joint family property made by a father, *for which the consideration is an antecedent debt of the father* not tainted with immorality or the object of which is to pay *such* a debt. That this is the true scope of the doctrine is shown by the numerous decisions, of which it is sufficient to refer to *Lal Singh* v. *Deo Narain Singh* (1) the decisions of the Privy Council cited in the judgment in that case, and the judgment of the Full Bench in *Badri Prasad* v. *Madan Lal* (2). These cases show that the *doctrine has no application to a case in which no antecedent debt of the father, that is a debt antecedent to the alienation in question is concerned as* the consideration or object of the alienation. In the present case the deed does not state any antecedent debt of the father as the consideration or the object of the sale. (The italics are mine.) Nothing can be clearer than this language of the learned Chief Justice. In his judgment my brother Banerji endorsed the view expressed by Sir Arthur Strachey in the following language:— "According to the well known rulings of the Privy Council,

(1) (1886) I. L. R., 8 All., 279. (2) (1893) I. L. R., 15 All., 75.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

an alienation of joint family property made by the father of a joint Mitakshara family cannot be impeached by his sons, if such alienation has been made in lieu of an antecedent debt or for the payment of the father's debt, unless the son can prove that the debt was incurred for an immoral purpose, the reason for the rule being that it is the pious duty of the son to pay his father's debt not tainted with immorality. Had the transaction in the present case been that of a sale made in lieu of an antecedent debt, or for the payment of a debt due by the father, the principle which the learned Judge of this Court has applied would have been applicable. But in this case there was no allegation that the consideration for the sale was an antecedent debt of the father or that it was taken for the purpose of paying off the father's debt." Now in that case it was found that there was no consideration at all for the sale. Consequently the suit was bound to succeed; but I cite the case as showing the view of the law which was entertained at this time by the learned Judges who decided it. This was the case of a sale, but it is obvious that no distinction can be drawn between alienation by out and out sale and alienation by mortgage. A mortgage is a sale *sub modo*. The word 'alienation' frequently met with in the text books and judgments embraces both sale and mortgage.

In the case of *Ram Dayal* v. *Ajudhia Prasad* (1) my late brother Burkitt and myself adopted the view of the law expressed in *Manbahal* v. *Gopal Misra*.

Now by the expression antecedent debt I understand a debt which is not for the first time incurred at the time of a sale or mortgage that is presently incurred but a debt which existed prior to and independently of such sale or mortgage. It must be a *bona fide* debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object. This was the interpretation placed upon the expression by the Calcutta High Court in the case of *Hanuman Kamat* v. *Dowlut Mundar* (2), in which it was held that although no member of a joint Hindu family governed by the Mitakshara or Mithila law has the authority, without the consent of his co-sharers, to sell or mortgage even his own share

(1) (1905) I. L. R., 28, All., 323. (2) (1884) I. L. R., 10 Calc., 528.

in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of his own and his sons in order to pay off antecedent personal debts, the sons cannot avoid such alienation unless they prove that the debts were immoral; that to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not merely in consideration of a loan or a payment made to the father on the occasion of his making the alienation; and that in the case of a voluntary sale the purchase money does not constitute an antecedent debt such as to render that sale binding on the sons unless they prove the transaction to have been immoral.

Again in the same High Court in the case of *Surja Prasad* v. *Golab Chand* (1) Ghose and Harington, JJ., held that in a case of a joint Mitakshara family where the father raised money on a mortgage hypothecating ancestral family property and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgage as to the purpose for which the debt was incurred, the mortgage security could not be enforced against the son (the father having died) unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question and that under the circumstances the mortgage was not binding upon the son, but that the debt not having been proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money decree against the sons, not upon the mortgage security, but upon the simple obligation created by the bond, and that a suit for such a relief must, under the Limitation Act, be instituted within six years from the date of the mortgage bond.

In the Madras High Court in the case of *Venkataramanayya Pantulu* v. *Venkataramana Doss Pantulu* (2) Sir Arnold White, C. J., and Subramania Ayyar and Davis, JJ., held, following several decisions of that High Court, that when a debt was incurred at the time of sale or mortgage, it was not an

(1) (1900) I. L. R., 27 Calc., 762. (2) (1905) I. L. R. 29 Mad. 200.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C.J.

antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). In their judgment the learned Judges observe :—"As regards the question of sale there does not appear to be any decision, either of the Privy Council or of the Courts of this country, that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to and independently of the sale." I think it to be beyond question that the expression "antecedent debt" means what it expresses, namely a debt incurred prior to and independent of the sale or mortgage sought to be enforced.

The propriety of the decision in the case of *Jamna* v. *Nain Sukh* (2) was questioned in the two cases of *Debi Dat* v. *Jadu Rai* (3) and *Babu Singh* v. *Bihari Lal* (4). In the first mentioned case my brother Banerji seems to me to have resiled from the view laid down by him in *Manbahal Rai* v. *Gopal Misra*. He and my brother Aikman held in a suit for sale on a mortgage of joint family property executed by a father and three of his sons that the fourth son, who was a minor and four grandsons, also minors who were not executants of the mortgage, were properly arraigned as defendants, inasmuch as their own interests in the joint family property would be liable under the mortgage unless they could show that either the mortgage debt was never incurred or that it no longer subsisted or that it was tainted with immorality. The learned Judges delivered a very short judgment holding that the ruling in the case of *Jamna* v. *Nain Sukh* was overruled by their lordships of the Privy Council. They say :—"It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in *Badri Prasad* v. *Madan Lal*, and to the ruling of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*, it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred, or is no longer in existence or that it was tainted with immorality. I may here again point out that in the case of *Badri*

(1) (1878) I. L. R., 5 Calc., 148.
(2) (1887) I. L. R., 9 All., 493.
(3) (1902) I. L. R., 24 All., 459.
(4) (1908) I. L. R., 30 All., 156.

Prasad v. *Madan Lal*, the consideration for the mortgage which formed the basis of the suit was with a trifling exception money advances antecedently made by the mortgagee to the father.

In the case of *Babu Singh* v. *Bihari Lal* (1), which was a suit for sale upon a mortgage my brothers Banerji and Richards held that the decision in the case of *Jamna* v. *Nain Sukh*, could no longer be supported and that it was sufficient in order to establish the liability of a son to pay the personal debt of his father, if the debt be proved and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. In that case my learned brothers quoted with approval my words in the Full Bench case of *Karan Singh* v. *Bhup Singh* (2), as follows :—"It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes, or was such a debt as does not fall within the pious duty of the sons to discharge." Now the suit of *Karan Singh* v. *Bhup Singh* was not a suit to enforce payment of a mortgage debt. It was a case in which a creditor obtained a decree for profits against the lambardar of a village and in execution of that decree attached immovable property belonging to a joint family of which Tota Ram, the lambardar, was the head. The sons and grandsons of the lambardar were the plaintiffs in the suit, and in it they sought a declaration that their interests in the property attached were not liable to attachment and sale in execution of the decree against their father. As pointed out in the judgment there was no allegation that the debt in respect of which the execution proceedings were had was for immoral purposes or such a debt as the sons and grandsons were relieved from their pious obligation to satisfy. This being so, and the sons being liable to satisfy the debt the joint family property was liable to attachment and sale in execution of the decree. The claim was in fact enforced against the sons by reason of their pious obligation to pay their father's debts. My brothers Banerji

(1) (1908) I. L. R. 30 All., 156. (2) (1904) I. L. R., 27 All. 16

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

and Richards seem not to recognize any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father's debts, and a case in which a mortgagee of the father seeks to enforce a mortgage against the son by sale of the mortgaged property.

In the case before us, as I have said, it is not denied that sons in a Mitakshara family are liable to pay their father's debts, provided those debts be not tainted with immorality. What is denied is that a mortgage by a father in such a family is binding upon his sons if that mortgage had not been executed to satisfy an antecedent debt or a family necessity and the mortgagee has failed to show that he made any reasonable inquiry as to the necessity for the loan. A son admittedly may be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father's debts provided that the suit be not barred by limitation and a decree passed in such a suit may be enforced in execution by sale of the ancestral property of the family.

Now let me turn to the decisions of their Lordships of the Privy Council which have been relied upon as supporting the view that a mortgage executed by a Hindu father, in a Mitakshara family not shown to have been made to satisfy an antecedent debt or a family necessity but not shown to have been for a debt tainted with immorality, is binding upon his sons. The first to which I shall refer is the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). In that case an *ex parte* decree for money had been obtained against a Hindu governed by the Mitakshara Law upon a bond, whereby he had mortgaged his ancestral immovable estate and the estate was attached and sold. Prior to the sale in execution the judgment debtor died and his infant sons and co-heirs on filing a petition of objections, were referred to a regular suit. They instituted a suit *after the sale* against the execution creditor and the purchasers for a declaration of their right to the property sold and to have the mortgage bond, the *ex parte* decree and the execution sale set aside. It appeared that the father's debt had been incurred without justifying necessity and it was held that as between the infants and

(1) (1878) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88.

the execution creditor neither they nor the ancestral immovable property in their hands was liable for the father's debt, but that as regards the judgment debtor's undivided share in the estate sold whether or not his own alienation was valid by the law as understood in Bengal it was capable of being seized in execution and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceeding having at the time of the judgment debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale. It will be observed that as between the infants and the execution creditor neither they nor the ancestral property in their hands were held to be liable for the debt. In delivering the judgment of their Lordships Sir James W. Colvile remarked that "the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered) and the fact that the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether in order to bind adult coparceners, their express consent is not required." His Lordship then referring to the case of *Girdharee Lall* v. *Kantoo Lall*,(1) observed :—"This case is undoubtedly an authority for these propositions. First, that where joint ancestral

(1) (1874) L. R., 1 I. A., 321.

1903

CHANDRADEO SINGH v. MATA PRASAD.

Stanley C.J.

property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off antecedent debt, or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and *secondly* that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

The first of these propositions it will be observed deals with cases where joint ancestral property has passed out of a joint family either under a conveyance executed by a father *in consideration of an antecedent debt or* in order to raise money to pay off *an antecedent debt, or under* a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases and the words antecedent debt, seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons.

The next case to which I would refer is that of *Mussumat Nanomi Babuasin* v. *Modhun Mohun* (1). In that case the suit was instituted by the widow of a Hindu on behalf of her minor sons and herself *to set aside a sale* made in execution of a personal decree obtained against the father and husband, at which the defendant had become the purchaser and had as such obtained possession not only of the father's interest but also that of his sons. In this case, it will be observed, the ancestral property had passed out of the joint family under a sale in execution of a decree for the father's debt and therefore it fell within the propositions laid down in Suraj Bansi Koer's case. In delivering the judgment of their Lordships Lord Hobhouse made the following pronouncement :— "There is no question that considerable difficulty has been found in giving full effect to each of two principles

(1) (1885) L. R., 13 I. A., 1 ; I. L. R., 13 Calc., 21.

of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable for the father's debts and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. *Destructive as it may* be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with *immorality. On this important* question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

This pregnant statement of his Lordship has created much misconception, and it is upon the meaning intended to be conveyed by his Lordship that the Judges in the various courts in India have differed. On the one hand it has been held that this dictum is an authority for the proposition that a Hindu father in a joint Mitakshara family can give a valid mortgage of the joint ancestral property as security for an advance made to him at the time not to satisfy an antecedent debt or a family necessity but not made for an immoral purpose. On the other hand the view taken by other Judges is that this interpretation is too wide and that a mortgage to be valid must have an antecedent debt or some family necessity to support it or at least the mortgagee must after reasonable inquiry have satisfied himself as to the existence of an antecedent debt or a family necessity for the loan.

In the leading case of *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1), in which the powers of a

(1) (1856) 6 Moo. I. A., 393

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

manager for an infant heir to charge ancestral property by loan or mortgage were dealt with, the question was considered as to the party upon whom the onus of proof lay to prove that the alienation of a manager was *bona fide*. Their Lordships remark that the question on whom such *onus* lay was not capable of a general and inflexible answer, and then they observe (at page 419 of the report) :— "Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan," and they later on observe as follows:—" Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." Their Lordships were dealing in this case with the powers of the manager of an Hindu family, but the rule laid down by them is equally applicable to transactions in which a father in derogation of the rights of his sons under the Mitakshara law has made an alienation of ancestral family estate.

In the case of *Kameswar Pershad* v. *Run Bahadur Singh*, (1) it was held by their Lordships that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate, was bound at least to show the nature of the transaction and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities; that the principle was that the lender, although he is not bound to see to the application of

(1) (1880) I. L. R., 6 Calc., 843 847

the money and does not lose his rights if upon *bonâ fide* enquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things, namely, to inquire into the necessity for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the borrower is acting in this particular instance for the benefit of the estate. Their Lordships referred to the principles laid down in the case *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* and observed:—"They have applied those principles in recent cases not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely alienations by a widow, and to *transactions in which a father in derogation of the rights of his son under the Mitakshara law, has made an alienation of the ancestral family estate.* (The italics are mine.) The principle broadly laid down is that, although the lender is not bound to see to the application of the money, and does not lose his rights if upon a *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things, and then their Lordships specify what was required of the creditor in the case to which we have referred. This decision is in consonance with the provisions of section 38 of the Transfer of Property Act which are quoted in the Bombay case to which I shall presently refer. Their Lordships, it will be observed, did not in the case of *Nanomi Babuasin* v. *Modhun Mohun* profess to state any principle of law which had not been previously enunciated. The question determined in it was whether the entirety of a family estate, including the shares of minor sons had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit nor in the execution proceedings.

The case of *Jamna* v. *Nain Sukh* is on all fours with the case before us. The learned Judges who decided it drew a distinction between it and cases in which a decree had been obtained against the father and the joint property sold or cases in which the sons come into Court to ask for relief against a sale effected by their

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C. J.

father for an antecedent debt. Is it the case then that this ruling can no longer be considered as law in view of the ruling in *Nanomi Babuasin* v. *Modhun Mohun?* It will be noticed from the judgment that the learned Judges who decided it had in view and considered the rulings of their Lordships of the Privy Council.

Let us see now what has been the trend of the rulings of this and other High Courts upon the question before us since the decisions of the Privy Council in the cases to which I have referred. I have already mentioned the cases of *Debi Dat* v. *Jadu Rai* (1), and *Babu Singh* v. *Bihari Lal* (2). In the case of *Ram Dayal* v. *Ajudhia Prasad* (3), my late brother Sir William Burkitt and myself, adopting, as I have said, the view of the law expressed in *Manbahal Rai* v. *Gopal Misra*, held that a sale of ancestral property by a father in a joint Hindu family might be set aside on a suit by the sons, so far as it affected their interests, if there was no antecedent debt or valid necessity to support the sale, although the transaction might not be shown to be tainted with immorality. In *Maharaj Singh* v. *Balwant Singh* (4) the question now before us was discussed in the judgment of myself and Sir William Burkitt and the authorities were referred to. It was not necessary in that case to determine the point which is for determination in this appeal but an expression of our view of the law is to be found at page 541.

In the case of *Jamsetji N. Tota* v. *Kashinath Jivan Manglia* (5), the facts were these. By a written agreement of the 9th of March 1900, the first two defendants, a mother and a son contracted to sell to the plaintiff certain ancestral property. The plaintiff discovered that the first defendant had a minor son and he instituted a suit against the first and second defendants and the minor son for specific performance of the agreement, contending that the minor's interest was bound inasmuch as the property was sold in order to pay family debts. It was held that no decree could be made against the minor defendant; that the order to satisfy such of his debts as would be binding on his

(1) (1902) I. L. R., 24 All., 459.
(2) (1908) I. L. R., 30 All., 156.
(3) (1906) I. L. R., 28 All., 323.
(4) (1906) I. L. R., 28 All., 508.
(5) (1901) I. L. R., 26 Bom., 326.

heirs a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, but in the case before the Court there was no evidence of debts which justified the sale, and that it lies on the party who seeks to bind an infant to prove justifying circumstances and this the plaintiff had failed to do. The case came before Sir Lawrence Jenkins, C. J., and Starling J., on appeal from Russell, J. The learned Chief Justice in delivering the judgment observed as follows:—"The cases have now established *that to satisfy such of his* debts as would be binding on his son a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, while section 38 (in error described as section 34) *of the Transfer of Property Act provides that* 'where any person authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall as between the transferee *on the one part and other persons* (if any) affected by the transaction on the other part, be deemed to have existed if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith." The learned Chief Justice then remarks:—"This statutory provision is substantially a statement of the principle deducible from the cases on this point. But this principle obviously has no application where the transaction is still incomplete; for it presupposes an actual *transfer for consideration.* Here there has been no transfer, nor has the consideration for the transfer been performed. Therefore the declaration sought in this suit against the infant defendant must be supported on some other basis. *But the only basis suggested is the analogy of this very rule; for it is argued that as* the completed transaction would have been supported and sanctioned against the infant son, so ought the incomplete transaction to be enforced against him. True, *there is a superficial resemblance* between the two positions, yet it is but superficial: the essential basis of the rule is absent The duty to discharge the father's debts justifies the acquisition of the money required for that purpose even though it be by sale of the ancestral immovable land. But the existence or a reasonable belief by the purchaser

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C. J.

in the existence of those debts is a necessary condition. Now it is quite clear that the plaintiff's agents by whom alone the negotiations were conducted made no inquiry as to the existence of justifying debts." Then later on he observes:—"We therefore, have to see whether there are now debts that call for or at any rate justify the conversion of the ancestral immovable property into money. On the evidence before us I am not satisfied of this, and it follows as a necessary consequence that in my opinion the declaration should not be made." This ruling supports the appellant's contention.

The ruling of Boddam and Bhashyam Ayyangar, JJ., in the case of *Chidambara Mudaliar* v. *Koothaperumal* (1) on the other hand supports the respondent's contention but it was overruled by the Full Bench of the Madras High Court in the case of *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (2). In the first mentioned case it was held that a debt incurred by a Hindu father, which was not shown to be illegal or immoral, was, even during the lifetime of the father, binding on the son's interest in the family property, and that in the case of a mortgage debt incurred by the father, the mortgage was binding on the son, notwithstanding that there was no debt anterior to the mortgage but only the debt incurred at the same time as the mortgage, the mortgage being executed as security therefor. The learned Judges obseved that "on principle it is difficult to make any distinction between mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son for his share in the mortgaged property can as a general rule be seized and brought to sale, even in the latter case for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage) unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment." This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the

(1) (1903) I. L. R., 27 Mad., 326. (2) (1905) I. L. R., 29 Mad., 200.

creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this province is well known. Money lenders are ever ready to advance money to thriftless or extravagant land owners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. Money lenders are chary of making large advances to landowners on personal security. Now if in negotiations for a loan on a mortgage lenders are obliged to make inquiry and satisfy themselves that the loan is required to meet a legal necessity this will afford some protection to the other members the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection. A father of extravagant habits might on the security of the ancestral property borrow large sums to satisfy extravagant fancies. He might emulate the folly of the eccentric king of whom we have lately read, who expended the treasure of his kingdom in building a castle on airy heights, and so strip his posterity of their ancestral possessions. The question is not one of mere academic interest but one of substance. The decision in *Chidambara Mudaliar* v. *Koothaperumal* was overruled, as I have said, by Sir Arnold White, C. J., and Justices Subramania Ayyar and Davies in the latter case which I have already cited, in which it was held, following the earlier decision in *Sami Ayyangar* v. *Ponnammal* (1) that a sale or mortgage of joint family property by a father is binding on

(1) (1897) I. L. R., 21 Mad., 28.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C. J.

the son's share only *when there is an antecedent debt* that is a debt existing prior to and independently of the sale or mortgage. In the course of their judgment the learned Judges remark that "there does not appear to be any decision either of the Privy Council or of the Courts of this country that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to, and independently of the sale." This is a direct authority in support of the contention advanced by the appellants.

Of the cases in the Calcutta High Court the first to which I shall refer is that of *Luchmun Dass* v. *Giridhur Chowdhry* (1), which came before a Full Bench consisting of Sir Richard Garth, C.J., and Jackson, Pontifix, Morris, and Mitter, JJ. In that case the manager of a joint Mitakshara family consisting of a father and a minor son, raised money on the mortgage of family property. It was not proved on the one hand that there was legal necessity for raising the loan, nor on the other that the money was raised or expended for immoral purposes or that the lender inquired as to the purposes for which the money was required. It was held, amongst other things, that the mortgage itself, upon which the money was raised could not be enforced, but the debt contracted by the father being itself an antecedent debt within the rules of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole of the ancestral estate inclusive of the mortgaged property. This is an important decision which supports the view contended for by the appellants.

I next come to the case of *Surja Prasad* v. *Golab Chand* (2). In that case a father in a joint Mitakshara family raised money on a mortgage hypothecating ancestral property and it was not proved that the money was required for payment of any antecedent debt, or that the money was raised or expended for illegal or immoral purposes or that any inquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred. The facts are on all fours with those in the case before us. It was there contended that in view of the later

(1) (1880) I.L.R., 5 Calc., 855. (2) (1900) I.L.R., 27 Calc., 762.

decisions of the Privy Council a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception, and that there was no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons, that the sons are bound to pay all debts whether secured or unsecured provided they were not incurred for illegal or immoral purposes. On the other side the argument was that the bond could only be enforced against the sons as a simple money bond if a suit were instituted within six years from the due date of the bond and that as the suit was instituted after the expiry of six years from the due date, it was barred by limitation. Ghose, J., (now Sir Chunder Madhub Ghose) an eminent authority on Hindu Law, and Harington, J., held that the mortgage was not binding on the sons, but that the debt not having been proved to have been incurred for illegal or immoral purposes the mortgagee would be entitled to money decree against the defendants, not upon the mortgage security but upon the simple obligation created by the bond, and that a suit for such a relief must under the Limitation Act be instituted within six years from the due date of the bond. The decision in *Luchmun Dass* v. *Giridhur Chowdhry*, to which I have referred, and also in *Khalilul Rahman* v. *Gobind Pershad* (1) were relied on.

In the later case of *Maheswar Dutt Tewari* v. *Kishun Singh* (2) Brett and Sharfuddin, JJ., dissenting from the decision in *Luchmun Dass* v. *Giridhur Chowdhry* and *Surja Prasad* v. *Golab Chand*, held that a mortgage by a father in a joint Mitakshara family, composed of father and sons on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the sons and that the limitation applicable to a suit on the bond against the sons as well as the father was that provided by article 132, schedule II of the Limitation Act. The learned Judges decided this case on the assumption that the law as laid down in the case of *Luchmun Dass* v. *Giridhur Chowdhry* could not be held to be any longer binding in view of the later decisions of the Privy Council.

The same question came before another Bench of the Calcutta High Court, consisting of Mookerjee and Holmwood, JJ., in the

(1) (1892) I.L.R., 20 Calc., 328. (2) (1907) I.L.R., 34 Calc., 184.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley, C J

case of *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1). In that case a father in a joint Mitakshara family consisting of a father and his minor son, mortgaged property belonging to the joint family. It was not proved that there was any legal necessity for the loan, or any inquiry by the lender, nor that the loan was contracted for illegal or immoral purposes. It was held in a suit by the mortgagee to enforce his security that he was entitled to have the security enforced as against the share of the mortgagor and also to a decree which would enable him to realize the debt by the sale of the share of the son in the ancestral property. The learned Judges held that the decision in *Luchmun Dass* v. *Giridhur Chowdhry* had not been overruled by the Privy Council and was binding upon them and pointed out the distinction existing between the position of a son in a suit in which the mortgage by his father is sought to be enforced against his share in the property and his position after the alienation has been completed by an execution sale. They dealt with the question at considerable length and pointed out that the Judges who decided the case of *Maheswar Dutt Tewari* v. *Kishun Singh* not only extended the principle laid down by their Lordships of the Judicial Committee in connection with a case where property has passed out of the family to cases where the security given by the father is sought to be enforced against his sons and also extended the rule laid down by the Judicial Committee as applicable to cases of complete alienation to cases of partial alienations such as mortgages. They point out that their Lordships limited their observations in *Girdharee Lall* v. *Kantoo Lall* to cases of conveyance executed by the father in consideration of an antecedent debt and sales in execution of decrees for the father's debt.

Now I do not profess to have exhausted the authorities on the question before us, but I think that the cases to which I have referred fairly illustrate the contending views expressed on that question. My learned brothers who decided the cases of *Debi Dat* v. *Jadu Rai* and *Babu Singh* v. *Bihari Lal* treated the case of *Jamna* v. *Nain Sukh* as overruled, contenting themselves by stating that, having regard to the Full Bench ruling in *Badri*

(1) (1907) I.L.R., 34 Calc., 735.

Prasad v. *Madan Lal* and the ruling of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*, the ruling in *Jamna* v. *Nain Sukh* can no longer be considered as law.

Is there any solid foundation for the contention that their Lordships of the Privy Council overruled in the cases which I have cited the clear and definite rule of the Mitakshara? According to that rule it is a settled point that property in ancestral estate is by birth, and that the father is subject to the control of his sons in regard to that estate, it being ordained that a gift or sale of such should not be made without the concurrence of all the sons, this being the only exception that "a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes." A son being under a pious obligation to pay his father's debts, an alienation by the father has been held to be binding on him in view of this obligation, but only, as I think, so binding where the debt is an antecedent debt. The rule of the Mitakshara it is said must be deemed to have been modified by the rulings of the Privy Council, but admittedly it has not been expressly overruled. The *dictum* in *Nanomi Babuasin* v. *Modhun Mohun* which I have quoted, namely:—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality" is relied on as establishing this proposition. It appears to me to do nothing of the kind. That the sons cannot set up their rights against their father's alienations for an antecedent debt I admit, but that they cannot resist the enforcement of a mortgage made by their father alone to secure money borrowed at the time and not proved to have been borrowed to meet a family necessity or to satisfy an antecedent debt I deny. It is contended that their Lordships words that the sons cannot set up their rights against their father's "creditors' remedies for their debts, if not tainted with immorality," justifies the view that a Hindu father can create a valid mortgage of the joint family property which will be binding on his

1909

CHANDRADEO SINGH v. MATA PRASAD.

Stanley, C.J.

sons for a debt which is not antecedent. It seems to me that this interpretation of the dictum is too wide and that the words "against his creditors' remedies for their debts" refer to those remedies only which legally the creditors of the father possess, for example in the case of an ordinary debt a right to sue the son for the recovery of the debt on the basis of his pious obligation to satisfy that debt and on obtaining a decree to attach and sell the joint family property. This interpretation my brother Aikman suggested during the argument. The two principles of the Hindu Law are not antagonistic, the one being that a Hindu father can create a valid mortgage of the joint family property to satisfy an antecedent debt or a family necessity, but only to satisfy such debt or necessity, the other being that a Hindu son is bound under a pious obligation to satisfy his father's debt if it be not tainted with immorality. The right to maintain a suit in each case is of course controlled by the law of Limitation. In the one case there is a secured debt. In the other case there is merely a personal liability. According to the law as administered by the courts of this Province, a member of a joint family cannot validly mortgage his undivided share in ancestral property established in coparcenary on his own private account without the consent of the co-sharers in that estate. *Balgobind Das* v. *Narain Lal* (1). It follows from this that if the mortgage in suit is not binding *in toto* it is not binding as to the mortgagor's share in the mortgaged property.

I have examined the later decision of the Judicial Committee with a view to ascertain if there be any pronouncement which supports the broad interpretation of the ruling in *Suraj Bansi Koer's* case for which the plaintiffs respondents contend, but without success. On the contrary their Lordships express their indisposition to extend the doctrine of the alienability by a coparcener even of his undivided share without the consent of his co-sharers beyond the decided cases. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2) Sir James W. Colvile, who

on his right to a partition, pointed out that *Suraj Bunsi Koer's*

(1) (1893) I. L. R., 15 All., 339. (2) (1880) L. R., 7 I. A., 181.

case was one of an execution against a mortgaged share and was decided "on the ground that the proceedings had then gone so far in the lifetime of the judgment debtor (in report 'mortgagor') as to give, notwithstanding his death, a good title against his co sharers to the execution purchasers." He then remarks:—" Their Lordships are not disposed to extend the doctrine of the alienability by a coparcener of his undivided share without the consent of his co-sharers beyond the decided cases." In the case of *Kameswar Prashad* v. *Run Bahadur Singh* (1) it was held by the Judicial Committee that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, a creditor seeking to enforce a charge on such an estate is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities. Sir James W. Colvile again commented upon the decision in *Hanoomanpersaud Panday's* case and to the law as therein laid down, and then observes :—" It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities. " This was, it will be observed, the case of a mortgage. In the case of *Madho Parshad* v. *Mehrban Singh* (2), in which it was held that where a Hindu without the consent of his co-parcener had sold his undivided share in the family estate for his own benefit and received the purchase money to his own use, his *surviving co-parcener* was entitled on his death under the Mitakshara law by survivorship to recover the share so sold from the purchaser, and that the latter had no equity or charge thereon against such survivor in respect of his purchase money. Lord Watson, who delivered the judgment of their Lordships, commented upon the decision in *Suraj Bunsi Koer's* case and pointed out that the right of the purchaser in that case was affirmed on the ground that before the death of the judgment-debtor execution proceedings had gone so far as to constitute in favour of

(1) (1880) I. L. R., 6 Calc., 843. (2) (1890) L. R., 17 I. A. 19

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Stanley C. J.

the judgment creditor a valid charge upon the joint estate to the extent of the undivided interest of the deceased which could not be defeated by that event, but at the same time observed that "if no proceedings had been taken to enforce the debt in the lifetime of the judgment-debtor, his interest in the property would have survived on his death to his sons so that it could not be afterwards reached by the creditor in their hands". Then again in the case of *Balgobind Das* v. *Narain Lal* (1), it was held to be the settled law of the Mitakshara as administered in Bengal and the North-Western Provinces, that a Hindu cannot without the consent of his co-parceners sell or mortgage his undivided share in ancestral estate for his own benefit. Sir Richard Couch in delivering judgment approved of the passage in the judgment in the case of *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, which I have quoted, and also the judgment in *Madho Prasad* v. *Mehrban Singh*. In regard to the judgment in the last mentioned case he observes :—"In the judgment delivered by Lord Watson it is said that the counsel for the appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate, and that he likewise conceded that the sales being without the consent of the co-parcener, and justified by legal necessity, were according to that law invalid ; but he maintained that the transactions being real and the prices actually paid, respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase money. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold except on condition of its being made at once available for the repayment of the price which he received but that the respondent who took by survivorship was not affected by any equity of that kind and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving coparcener, except by repeating the rule of the Mitakshara laws. In view of these rulings it seems to me impossible to hold that their Lordships

(1) (1893) I. L. R., 20 I. A. 116.

1903

CHANDRADEO SINGH v. MATA PRASAD.

Stanley C. J.

have extended the principle which underlies the decision in *Suraj Bansi Koer's* case. On the contrary they seem to me to have guarded themselves against the suggestion that the clear and explicit rule of the Mitakshara which precludes the alienability of immovable property by a coparcener without the consent of his coparceners had been repealed or might be treated as a dead letter.

For the foregoing reasons I am of opinion that the Court below was wrong in treating the ruling in *Jamna* v. *Nain Sukh* as no longer binding, and that the appeal should therefore be allowed as regards the first plea.

KNOX, J.—The question submitted to us for our consideration in this second appeal is whether a father, the head and managing member of a Hindu family, can mortgage the family property and exclude his sons from questioning the transaction, when it is not proved that the mortgage was executed on account of an antecedent debt. It has been found, and we must accept the finding, that (1) there is no evidence to show that the money which formed the consideration of the mortgage was borrowed or applied to the discharge of any antecedent debts. (2) The appellants, who are sons and grandsons of the mortgagor, who died before the institution of the suit, have not alleged, much less proved that the debt secured by the mortgage was tainted with immorality.

The text of Hindu law which bears upon the question is to be found in the Law of Inheritance from the Mitakshara, Chapter I, section I, paras. 27, 28 and 29. I give the translation as it occurs in the edition by Mr. Girish Chandra Tarkalankar (1870). So far as I can judge the translation is accurate, sufficiently accurate at any rate for the present purpose and so far as I can find the text under consideration has, with one exception, not been doubted. That exception is the passage in para. 27, which runs "no gift or sale should be made." The words न दानन्नच विक्रयः used in the passage are read by Raghunandana as वृत्तिलोपोविगर्हितः

According to him the correct reading in place of "no gift or sale should be made" is "the cutting off or the expenditure of the means of livelihood is censured." The only interest that

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Knox, J.

attaches to this reading is that apparently any tendency there has been to question the text is in the direction of widening, not of narrowing its meaning. The passage then runs as follows:—

"27. Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, "Though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

28. An exception to it follows:—" Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family and especially for pious purposes."

29. The meaning of the text is this:—While the sons and grandsons are minors, and incapable of giving their consent to a gift, and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

So far as this passage can be any guide it lays down (1) the broad rule that though the power of a father in respect of movable property is ultimated, in the case of immovable property it is limited and he is with regard to it subject to the control of his sons, (2) an exception to that rule, *viz.*, that even a single owner may conclude a donation, mortgage or sale of immovable property under certain stated circumstances.

There is no longer any question that it is a duty of a son to pay the debts contracted by his father unless they are tainted with immorality. This text of the Mitakshara, Chapter VI-47 is almost too well known to need reproduction:—" A son is not bound to pay, in this world, his father's debts if they are incurred for spirituous liquor, or for gratification of lust, or in gambling nor is he bound to pay any unpaid fines or tolls, or idle gifts."

Viewed from the standpoint of Hindu text writers it seems obvious that a creditor who claims that he has lent money to the father of a Hindu family and then presses that father to charge immovable property with that debt has to follow the general rule and principle which applies to the proof of exceptions to a rule. On him lies the burden of proving that the father was by reason of a pious purpose empowered to conclude a mortgage. If he fails, his claim to enforce the charge fails. This principle is entirely in accord with the principles laid down for evidence in Hindu Law: Mitakshara on the Administration of Justice—Chapter I, section 6.

I do not propose to deal with the difficulties that have sprung from the case law that has risen round these texts. I have had the advantage of reading and carefully considering the exhaustive judgment of the learned Chief Justice on this point, and I can add nothing to it with advantage. I would therefore, *quoad* the first plea, allow the appeal and set aside the decrees of both the Courts below.

BANERJI, J.—This appeal arises out of a suit for the enforcement of a simple mortgage by sale of the mortgaged property. The mortgage was made by one Ram Narayan Kalwar and the property mortgaged is the joint ancestral property of the family. Both the mortgagor and the mortgagee are dead. The plaintiffs are the son and the grandson of the mortgagee. The defendants are the sons and grandsons of the mortgagor. The suit was defended by some only of the defendants, who denied the mortgage and urged that even if it was made by their ancestor it was not for a family necessity and was not therefore binding on them and their interests in the mortgaged property. The Court

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Banerji, J.

below has found, in concurrence with the Court of first instance, that the mortgage was executed by the defendants' ancestor for valuable consideration, that it was not proved that the money borrowed had been applied to the payment of an antecedent debt, and that it had not been alleged or proved that the debt secured by the mortgage was tainted with immorality. Accordingly a decree has been passed for sale of the mortgaged property. A question of limitation was raised but the lower appellate court did not try it in view of the conclusion at which it had arrived. From this decree the present appeal has been preferred and the two pleas set forth in the memorandum of appeal are:—(1) "The mortgage being not one for payment of an antecedent debt nor for family necessity was not binding on the appellants" and (2) "The claim based on the pious duty of sons to pay their father's debt was barred by time."

Upon the findings of the court below the position is this. The father and manager of a joint Hindu family consisting of father, sons and grandsons contracts a debt for such purposes as would make it the pious duty of the sons to pay the debt and as collateral security for it, mortgages joint ancestral property. The question is, can such a mortgage be enforced against the interests of the sons in the mortgaged property unless the mortgagee can show that the debt was incurred for family necessity? The question is really one of the burden of proof, that is, whether it is for the mortgagee to prove affirmatively that the loan was incurred for the necessities of the family or whether the sons must prove, in order to avoid liability for the debt, that it is tainted with immorality.

In my judgment, both upon principle and upon authorities, the *onus* is on the sons. The following propositions may be regarded as established beyond controversy:—

(1) It is the pious duty of a Hindu son to pay his father's debt if not tainted with immorality.

(2) In the case of a personal debt of the father the sons are liable, if they "cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge"; and "it is not necessary in order to establish a son's liability for his father's debt that it

should be shown that the debt was contracted for the benefit of the family." [See the Full Bench case of *Karan Singh* v. *Bhup Singh* (1).] For the realization of such a debt the joint ancestral property of the family is liable to be sold by auction and the burden of proof is solely on the son.

(3) If a mortgage is made by the father to pay an antecedent debt or if part of the consideration for such a mortgage is an antecedent debt due to the mortgagee himself, the mortgage may be enforced against the son even in the life-time of the father. The *onus* in such a case is on the son to prove that the debt was of such a nature that it was not his pious duty to pay it. This was held by the Full Bench of this Court in *Badri Pershad* v. *Madan Lal* (2).

(4) If joint ancestral property has been sold by the father for the payment of his debt or if it has been sold in execution of a decree for a mortgage debt or a simple debt of the father the son cannot recover the property unless he can show that the debt was contracted for immoral purposes. This has been held by their Lordships of the Privy Council in numerous cases commencing with the case of *Girdharee Lall* v. *Kantoo Lall* (3).

(5) Where a son comes into court to assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the *onus* is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it. See *Beni Madho* v. *Basdeo Patak* (4), approved of in subsequent cases.

What we have to consider is whether the burden of proof is shifted where a creditor of the father seeks as plaintiff to recover his debt by enforcement of the mortgage security given to him by the father.

The liability of a son to pay his father's debt arises, as pointed out by Mr. Mayne (Hindu Law, section 303, 7th edition) "from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts." This obligation has been held by their Lordships of the Privy Council

(1) (1904) I. L. R., 27 All., 16.
(2) (1893) I. L. R., 15 All. 75.
(3) (1874) L. R., 1 I. A., 321.
(4) (1890) I. L. R., 12 All., 99.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Banerji, J.

of the son for his father's debts arises. The amount of consideration paid down at the time of the sale is not a debt of the father though it may, in some cases, subsequently become a debt of the father. Therefore, a sale by the father must, in order to bind the son, be a sale for the necessities of the family or a sale for a consideration which consists of an antecedent debt of the father or of money received for the payment of the father's debts provided of course that the debt is not tainted with immorality. In the case of a mortgage, however, there is primarily a debt incurred by the father and the mortgage is only, as I have said above, collateral security for the debt. By reason of the son's pious duty he is liable for the father's debt and, therefore, for the mortgage made to ensure the recovery of the debt. In my judgment the case of a mortgage is not similar to that of a sale and the argument based on the analogy of a sale is fallacious. The distinction in this respect between a mortgage and a sale is often overlooked.

The view I have taken above is not only consistent with Hindu law and legal principles but is also supported by authority.

In the well known case of *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1) Lord Justice Knight Bruce, in delivering the judgment of their Lordships, said (at p. 421):—"Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt by the father. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate." In the case of *Girdharee Lall* v. *Kantoo Lal* (2) their Lordships, after quoting the above observations, remarked:—"That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the

(1) (1856) 6 Moo. I. A., 393. (2) (1874) L. R., 1 I. A. 321.

pious duty of the son to pay his father's debts, the ancestral property in which the son as the son of his father, acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce, 'the freedom of the son *from the obligation to discharge the father's debt has respect to* the nature of the debt, and not to the nature of the estate', whether ancestral or acquired by the creator of the debt." Their Lordships then proceeded to consider what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the ancestral property.

In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), their Lordships *formulated the propositions which were deduced from the* earlier rulings and stated the first of these propositions in the following terms:—"Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty *to pay their father's debts, cannot recover the property unless* they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted." Relying upon the words "antecedent debt", as mentioned in the judgment of their Lordships, it has been contended in this case, and held in some cases, that a mortgage is not binding on the sons unless it was made for an antecedent debt. In my *humble judgment* it would be placing too strained a meaning on the decision of their Lordships to hold that they intended to lay down the general rule that in every case of a transfer by the father, whether it was a sale or a mortgage, the transfer would not be binding on the son unless it was made for an antecedent debt. In the particular case before their Lordships a sale had taken place for an antecedent debt and, therefore, in formulating the rules applicable to such a sale, reference seems to have been made to an antecedent debt. As I have pointed out above, a sale by the father not made for a family necessity, would not be binding on the sons unless it was made for an antecedent debt which was binding on them by reason of their pious liability to pay their

(1) (1879) I. L. R., 5 Calc., 148.

father's debts. In the absence of an antecedent debt the consideration for the sale cannot itself be deemed to be a debt of the father and no question of pious obligation would arise. It was therefore necessary, in the cases before the Judicial Committee, to refer to antecedent debts. But I fail to find anything in their Lordships' judgment to show that they held or intended to hold that in the case of a mortgage too it must have been made by the father for an antecedent debt.

The most important decision of the Privy Council, which in my opinion concludes the matter, is that in the case of *Nanomi Babuasin* v. *Modhun Mohun* (1). After referring to the fact that the decisions either in India or in the Privy Council were not in harmony, Lord Hobhouse, in delivering the judgment of their Lordships, laid down the law in the following terms, apparently with a view to settle all controversy in future :— "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or *against the creditors' remedies for their debts* if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." That by the above pronouncement Lord Hobhouse intended to decide the matter conclusively and to bring into harmony all conflicting rulings is manifest from the remarks made by him in the later case of *Mahabir Pershad* v. *Moheswar Nath Sahai* (2) wherein he expressed the hope that recent decisions of the Committee would lessen the difficulties which had been felt before. "The words *or against his creditors' remedies for their debts*" do not, in my opinion, leave any room for doubt. What are a creditors' remedies for his debt? His remedies are a suit, a decree in the suit and a sale in pursuance of the decree. In the case of a mortgage his remedy by decree is a decree for the sale of the mortgaged property. According to their Lordships, the sons cannot set up their rights against the remedies to which I have referred, if the debts are not tainted with immorality. There is no reason to assume that their Lordships

(1) (1885) I. L. R., 13 Calc., 21 ; L. R., 13 I. A., 1.

(2) (1889) I. L. R., 17 Calc., 584 (588.)

1909

CHANDRADEO SINGH
v.
MATA PRASAD.

Banerji, J.

confined their remarks to the remedies of an unsecured creditor and did not intend them to apply to secured creditors also. In my judgment the words quoted above contemplate every one of the remedies open to every class of creditors whose debts are not of an immoral nature. This is further evident from the following observations of their Lordships:— "If his (the debtor's) debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit." It would surely be putting too limited a meaning on the words of their Lordships to hold that these remarks do not apply to the case of a mortgagee. Upon the authority of this ruling of the Privy Council it is no longer open to a son to resist the claim of a mortgagee from his father, except on the ground that the debt was not incurred at all or that it is tainted with immorality or that it is time-barred and it is not incumbent on the mortgagee to prove that the debt was contracted for the benefit of the family. In view of this ruling of their Lordships the dictum contained in the decision in *Kameswar Pershad* v. *Run Bahadur Singh* (1) on which Mr. *Gokul Prasad* relied, cannot be followed. If it be assumed that the question now before us is not concluded by the ruling in *Nanomi Babuasin's* case that question has never yet been decided by their Lordships in any other case. It is, therefore, open to us to consider it on its own merits. The question did not arise, and was not decided, in the case of *Suraj Bansi Koer,* which was a case of a sale in execution of a decree passed upon a mortgage given by the father for an antecedent debt. And I am not aware of any other ruling of the Privy Council on the subject.

Turning now to the decisions of the different High Courts in this country, I shall first consider those of our own Court.

In *Sita Ram* v. *Zalim Singh* (2) a mortgagee from the father and head of a joint Hindu family sued the mortgagor for sale of the joint ancestral property mortgaged by him. During the pendency of the suit the mortgagor died and his son was brought on the record as his legal representative. It

(1) (1880) I. L. R., 6 Calc., 843 (847). (2) (1886) I. L. R., 8 All., 231.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Banerji, J.

was found that the money was not borrowed to meet any family necessity and on this ground the Court below made a decree for the sale of the father's interests only and exempted the share of the son. Petheram, C. J., and Tyrrell, J., held, following the case of *Nanomi Babuasin* v. *Modhun Mohun*, that the mortgagee was entitled to a decree for the sale of the whole of the joint ancestral property, it not being proved that the loan was taken for immoral purposes. The decree of the Court below was set aside and a decree was made enforcing the mortgage against the entire family property.

In *Kishan Lal* v. *Garuruddhwaja Prasad Singh* (1) the Court below found that the mortgagor had taken the loan for his own private purposes and dismissed the suit against his minor son. Blair and Burkitt, JJ., held that this was not a sufficient reason for exonerating the son from the pious duty of paying his father's debt and made a decree for sale of the son's interests comprised in the mortgage. Burkitt, J., who delivered the judgment of the Court, said:—"It is now settled law in this Court since the case of *Badri Prasad* v. *Madan Lal* (2) that a son can be sued jointly with his father to recover a debt contracted by the father, if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father's debt."

In *Badri Prasad* v. *Madan Lal* (2) which is a decision of a Full Bench of the whole Court, the father mortgaged joint ancestral property, the consideration for the mortgage being some money advanced at the time and some personal debts due by the father to the mortgagee himself by which the family did not benefit, but which were not tainted with immorality. It was held that the matter was concluded by the decision of their Lordships of the Privy Council in *Nanomi Babuasin's* case, and that the sons' interests were liable under the mortgage. A decree was made for sale of the mortgaged property including the interests of the sons, in enforcement of the mortgage. In considering the effect of this decision the learned Judges who decided the case of

(1) (1899) I. L. R., 21 All., 238. (2) (1893) I. L. R., 15 All., 75.

Maharaj Singh v. *Balwant Singh* (1), to which I shall refer hereafter, expressed the opinion that according to this decision "no obligation lay on the plaintiff to prove that any inquiry was made by the lenders as to the necessity of the loans when money was advanced" by them and also the burden of proving that the debts were tainted with immorality lay upon the son.

In *Debi Dat* v. *Jadu Rai* (2), *Chail Behari Lal* v. *Gulzari Mal* (3), *Kallu* v. *Fateh* (4), and *Babu Singh* v. *Bihari Lal* (5), it was held that it is not necessary for the mortgagee to prove that the debt secured by the mortgage was incurred for the benefit of the family and that the burden of proof lies on the son and not on the mortgagee, plaintiff. To the first two of these cases my brother Aikman was a party. In *Maharaj Singh* v. *Balwant Singh* (1) the question was not decided, but the learned Judges (Stanley, C. J., and Burkitt, J.) observed "in passing" that in their opinion it would be "not unreasonable to require proof on the part of the creditor that before he entered into the transaction he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family." (p. 541)

The only case in which the point was decided and the contrary view was held in this Court is that of *Jamna* v. *Nain Sukh* (6). The reasoning by which the judgment in that case is supported was criticised and dissented from by the Bombay High Court in *Chintamanrav Mehendale* v. *Kashinath* (7). With much of that criticism I agree. For the reasons I have already stated, I am, with great respect, unable to concur in this ruling. Furthermore, one of the cases from which the rule of law laid down in that case was deduced is that of *Lal Singh* v. *Deonarain Singh* (8) decided by Straight and Tyrrell, JJ. With reference to that case the same learned Judges said, in the later case of *Bhawani Bakhsh* v. *Ram Dai* (9), that upon further consideration they had come to the conclusion that "so far as it laid down that the *onus* rested

(1) 1906) I. L. R., 28 All., 508.
(2) (1904) I. L. R., 24 All., 459.
(3) (1909) 6 A. L. J. R., 133.
(4) (1904) 1. A. L. J. R., 316.
(5) (1908) I. L. R., 30 All., 156.
(6) (1887) I. L. R., 9 All., 493.
(7) (1889) I. L. R., 14 Bom., 320.
(8) (1886) I. L. R., 8 All., 279.
(9) (1891) I. L. R., 13 All., 216.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

Banerji, J.

upon the creditor the case had been wrongly decided, having regard to the decisions of the Privy Council." I see no reason to alter the opinion expressed by me in other cases that the ruling in *Jamna* v. *Nainsukh* can no longer be regarded as good law.

I may mention that since the hearing of this appeal I have come across an unreported case decided by the learned Chief Justice and Mr. Justice Burkitt, the principle of which supports the view taken above. It is the case of *Lala Sobba Ram* v. *Ran Singh*, F. A. No. 70 of 1905, decided on the 20th of April 1907, after the decision of the case of *Maharaj Singh* v. *Balwant Singh* (1). The facts of the case are set forth in the judgment of those learned Judges in *Ran Singh* v. *Sobha Ram* (2), which was a cross appeal from the same decree. The claim was to recover the amount due on a mortgage of the 24th of August 1893, executed by Badan Singh the father of the defendants, and for sale of the ¾th interests of the defendants in the mortgaged property. The amount secured by the mortgage was Rs. 2,000 of which Rs. 900 had been paid in cash on the date of the bond. The Subordinate Judge dismissed the claim for the amount of the bond on the finding that the debt was incurred for purposes of immorality, and also because the bond "was not executed by Badan Singh on account of any legal necessity or for the benefit of the joint family." On appeal by the plaintiff the learned Chief Justice and Mr. Justice Burkitt said in their judgment:—" We do not propose to consider, was the debt contracted for any legal necessity or for the benefit of the joint family. *These matters appear to us to be immaterial.*" (The italics are mine.) The learned Judges then proceeded to consider the evidence as to the nature of the debt and came to the conclusion that the defendants had failed to prove that it was tainted with immorality. They accordingly made a decree for sale of the interests of the sons in the mortgaged property. It was clear from the judgment that the learned Judges were of opinion that the question of necessity did not arise in a suit by the mortgagee against the sons and was immaterial for the purposes of the suit. The necessary

(1) (1906) I. L. R., 28 All., 508. (2) (1907) I. L. R., 29 All., 544.

inference is that the learned Judges considered that the burden did not lie on the plaintiff in such a suit to prove necessity.

It is thus manifest that, with the exception of the solitary case of *Jamna* v. *Nain Sukh*, the rulings of this Court so far from bearing out the contention of the appellants are against it.

The decisions of the Bombay High Court fully support my view. In *Chintamanrav Mahendale* v. *Kashinath* (1), Sarjent, C. J. and Nanabhai Haridas, J., held, in concurrence with West and Birdwood, JJ., that the effect of the decision of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (2), was that "the father's disposition of the family estate. . . is made to affect the sons' as well as the fathers' interest, except so far as the son can establish that the voluntary disposal was made under circumstances which deprived the father of the disposing power." They further held that "this view of the power of the father to bind the sons' interest in the family estate, except in certain special cases, necessarily throws the *onus* on the sons of defeating his creditors' remedies against the ancestral estate by establishing the existence of those circumstances." Following this ruling it was held by Parsons and Ranade, JJ., in *Ramchandra* v. *Fakirappa* (3), that "ancestral property is available for the payment of the debt of the father, unless the son can prove that the debt was contracted for an immoral or illegal purpose." The suit in that case was brought by a mortgagee to enforce two mortgage bonds against the father the mortgagor, and his sons. The District Judge dismissed the claim in respect of one of the bonds on the ground that it had not been proved to be for family necessities. The High Court reversed the decision of the Judge and decreed the claim for sale.

The decisions of the Madras High Court are conflicting. In *Chidambara Mudaliar* v. *Koothaperumal* (4), to which I have already referred, Boddam and Bhashyam Ayyanjar, JJ., held that a mortgage made by the father for a debt then incurred is binding on the sons' interest if not tainted with immorality. This ruling was reversed by a Full Bench of three Judges (White, C.J, and Subrahmania Ayyar and Davis, JJ.,) in

(1) (1889) I. L. R., 14 Bom., 320.
(2) (1885) I. L. R., 13 Calc., 21.
(3) (1900) 2 Bom., L. R., 450.
(4) (1903) I. L. R., 27 Mad., 326.

1909

CHANDRA DEO SINGH v. MATA PRASAD.

Banerji, J.

Venkataramanaya Pantulu v. *Venkataramana Doss Pantulu* (1). The learned Judges said that having regard to the word "antecedent," as used in the judgment of the Privy Council in *Suraj Bansi Koer's* case, they were unable to adopt the view taken in *Chidambara Mudaliar* v. *Koothaperumal*, "although on principle they might be disposed to do so." For the reasons I have given in an earlier part of this judgment I feel myself unable to take the same view of the effect of the decision in *Suraj Bansi Koer's* case as the learned Judges of the Full Bench.

As for the rulings of the Calcutta High Court they also are not in harmony. The first case on the point is that of *Luchmun Dass* v. *Giridhur Chowdhry* (2), decided by a Full Bench. In that case it was held that "the mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property." In *Gunga Prosad* v. *Ajudhia Pershad Singh* (3), however, Mitter and Maclean JJ., made a decree for the sale of the mortgaged property both against the father and the son. In *Khalil-ul-Rahman* v. *Gobind Pershad* (4), the Full Bench ruling referred to above was followed and a decree made in the terms laid down in that ruling. The same was the case in *Surja Prasad* v. *Golab Chand* (5), decided by Ghose and Harington, JJ. These cases were dissented from by Brett and Sharf-ud-din, JJ., in *Maheshwar Dutt Tewari* v. *Kishun Singh* (6), and it was held that a mortgage made by a father on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the son. The learned Judges considered that in view of the decisions of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (7), and *Bhagbut Pershad Singh* v. *Girja Koer* (8), the law laid down by the Full Bench

(1) (1905) I. L. R., 29 Mad., 200.
(2) (1880) I. L. R., 5 Calc., 855.
(3) (1881) I. L. R., 8 Calc., 131.
(4) (1892) I. L. R., 20 Calc., 328.
(5) (1900) I. L. R., 27 Calc., 762.
(6) (1907) I. L. R., 34 Calc., 184.
(7) (1885) I. L. R., 13 Calc., 21.
(8) (1888) I. L. R., 15 Calc., 717.

1909

CHANDRA DEO SINGH v. MATA PRASAD.

Banerji, J.

in *Luchmun Dass* v. *Giridhur Chowdhry* (1), could not be held to be binding. All these decisions were discussed by Mookerjee and Holmwood, JJ., in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (2), and the learned Judges held that the Full Bench ruling mentioned above was still binding on the Court, apparently on the ground that it had not been expressly over-ruled by the Privy Council. They were of opinion that as the decision of the Full Bench was binding on them it was "unnecessary to inquire whether it is well founded on reason and principle," but they added "that the matter, if it were *res integra*, might not be free from considerable doubt and difficulty." With regard to these rulings I may quote the following *apposite* remarks of Mr. J. C. Ghose in his Principles of Hindu Law, 2nd edition, page 445:—"The rule that if the debt is antecedent, say by a day, to the mortgage, it binds the estate, but that it does not do so if the consideration for the mortgage is paid at the time, is certainly based on the earlier rulings of our Courts, but it is difficult to say that it is based on reason or on any principle of law. The distinction is so fine that for practical purposes it might have been disregarded. The rule of Hindu Law is clear that the sons cannot even take ancestral property without paying the father's debts, for on partition the father's debts, which are not improper, should be first paid."

For the reasons stated above the conclusions at which I have arrived are that as regards a Hindu son's liability to pay his father's debt not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt, that unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property, whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage; and that in a suit brought against the son to enforce the mortgage the *onus* is not on the plaintiff to prove that the debt was incurred for the benefit of the family but that

(1) (1880) I. L. R., 5 Calc., 855. (2) (1907) I. L. R., 34 Calc., 735.

1909

CHANDRA-DEO SINGH v. MATA PRASAD.

it is for the son to prove that having regard to the nature of the debt it was not his pious duty to discharge it.

I would, therefore dismiss the appeal.

AIKMAN, J:—The question which has to be decided by this Full Bench is one upon which great conflict of opinion has prevailed. This conflict of opinion has long existed. So far back as 1885 Lord Hobhouse in delivering judgment in the case *Nanomi Babuasin* v. *Modhun Mohun* (1) said:—"It is impossible to say that the decisions on the subject are on all points in harmony either here or in India." The numerous cases of more recent date cited by the learned counsel on each side in their able argument before us, show that great divergence of opinion still prevails. I do not propose to enter on a review of the mass of authorities cited to us. The most important of these have been set forth by the learned Chief Justice in his judgment, which I have had the advantage of reading. The question we have to decide is whether a mortgage of joint family property executed by a Hindu father as security for money advanced to *him* can be enforced *as a mortgage* after his death against his sons and grandsons there being on the one hand no suggestion that the mortgage debt was tainted with immorality, whilst on the other there is nothing to show that the money was taken either to discharge an antecedent debt, or to meet family necessities. In deciding this question we have to bear in mind two great principles of Hindu Law, one being that sons by birth have an equal ownership with the father in respect of ancestral immovable property; the other that so long as a father's debts are not tainted with immorality, sons are under a pious obligation to discharge them. The question is whether the liability of a son for his father's debts overrides the principle of the son's co-parcenary rights to such an extent as to enable a Hindu father, so long as in incurring obligations he avoids the taint of immorality, to deal with the joint family property as if he were the full owner of the property in which Hindu Law declares he has only a limited interest. In my opinion the question must be answered in the negative. A son may be liable to discharge his father's debts, and the father's creditor by taking proper steps may be

(1) (1885) L. R., 13 I. A., 1.

able to sell up the son's interests in the family property which has passed to the son on his father's death. But in my judgment, it does not follow from this that, unless under special circumstances which are not shown to exist in this case, a Hindu father can make a mortgage of his son's interests in the family property which can be enforced against the sons as a mortgage after the father's death.

It is now settled by decisions of the Privy Council that a father can make a mortgage of the joint family estate in order to discharge an antecedent debt, and that such a mortgage can be enforced as a mortgage against the sons. At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property.

In the judgment in the case referred to above, *Nanomi Babuasin* v. *Modhun Mohun*, there occurs the often quoted passage :—" Destructive as it may be of the principles of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle, that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think there is now no conflict of authority."

It will be noted that their Lordships here admit that the decisions referred to are destructive of the principle of independent co-parcenary rights which the sons undoubtedly possess.

In my opinion we should not go further in destroying the important principle of the sons' co-parcenary rights than we are compelled by authoritative decisions to do. We have not been referred to any decisions binding upon us as a Full Bench which compel us to hold that the plaintiffs respondents who have not succeeded in showing that the mortgage upon which they come into court was either for an antecedent debt, or to raise money

1909

CHANDRA DEO SINGH v. MATA PRASAD.

for the necessities of the family can enforce their bond as a mortgage, against the defendants.

I was a party to one of the decisions relied on by the courts below, *i.e.*, *Debi Dat* v. *Jadu Rai* (1). In that case it was taken for granted that the decision of this court in *Jamna* v. *Nain Sukh* (2) could no longer be considered as law. After hearing the question more fully argued, I am not prepared to adhere to the view then expressed.

In the present case the mortgagee took a mortgage from one whom he must be deemed to have known to possess only a limited interest in the property mortgaged and according to the law as laid down by the Privy Council in *Kameswar Pershad* v. *Run Bahadur Singh* (3) and in *Jamna* v. *Nainsukh*, as well as the principle embodied in section 38 of the Transfer of Property Act it was for him to show that he had taken reasonable care to satisfy himself that circumstances existed which would justify the father in mortgaging the joint family estate in derogation of his sons' rights. This burden the plaintiffs-respondents have failed to discharge. I therefore concur with the learned Chief Justice in thinking that the first plea in the memorandum of appeal must succeed, and in the order proposed by him.

RICHARDS, J.—This appeal arises out of a suit to realize the sum of Rs. 976 principal and interest alleged to be due on foot of a mortgage dated the 4th of September 1883 and made by one Ram Narain Singh in favour of one Ram Narain Kalwar. The plaintiffs are the son and grandson of Ram Narain Kalwar and the defendants are the sons and grandsons of Ram Narain Singh, who constituted a joint Hindu family. It was alleged in the plaint that the mortgage was executed by Ram Narain Singh as manager of the family for the benefit thereof. In the written statement it was not admitted that the mortgage was executed by Ram Narain Singh, as manager, or that the family were benefited, and it was alleged that the loan was simply the recent and personal debt of Ram Narain Singh. It was not alleged that the money was raised for immoral purposes.

The courts below have found that the mortgage was executed for good consideration. The court of first instance found that

(1) (1902) I.L.R., 24 All., 459. (2) (1887) I L.R., 9 All., 493
(3) (1880) I. L. R., 6 Calc. 843, (847).

it was not proved that the creditor made reasonable inquiries such as would statisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family. The lower court of appeal also found that it was not proved that the money was borrowed to pay off an "antecedent" debt. On the other hand both courts found that the defendants had not proved that the debt was tainted with immorality. On these findings both the courts below concurred in granting the usual decree for the sale of the mortgaged property under section 88 of the Transfer of Property Act, 1882. Hence the present appeal. The defendant's counsel in opening his argument admitted that if the plaintiffs had sued for a simple money decree they would on the findings (subject to the law of limitation) have been entitled to such a decree against the defendants and that the ancestral property and all other property acquired from Ram Narain Singh, would have been liable to be sold in execution of such a decree. Mr. *Dillon* also admitted that if the plaintiffs had proved that the mortagage had been made to secure a prior debt (even the prior private debt of Ram Narain Singh himself) the mortagage would have been a good mortagage and the defendants could not have resisted the sale of the ancestral property. It is contended however that the plaintiffs in the persent suit were not entitled to a decree for sale of the property comprised in the mortgage because they failed to prove that there was an "antecedent" debt. The plaintiffs on the other hand say that once it was proved that the mortagage was made for valuable consideration the defendants as sons and grandsons of Ram Narain Singh are liable for his debts and that the property can and should be sold under the mortagage created by him and that the only defence open to the defendants was to prove that the debt was tainted with immorality. There are two principles of Hindu law which both plaintiffs and defendants admit to be applicable, in the present case. The first principle is that no single member of a joint Hindu family can sell or mortgage the family property without the consent of the other members of the family save for legal necessity or for pious purposes. I may here say that for the purposes of this principle Ram Narain Singh must be looked upon as

1909

CHANDRADEO SINGH v. MATA PRASAD.

Richards, J.

simply a member of the co-parcenary body without any reference to his powers as father or manager of the family. The second principle is that if a Hindu incurs debts his sons and grandsons are liable to pay these debts unless they are tainted with immorality. It is not surprising that the attempt to give effect to each of these principles has given rise to much difficulty and confusion. There is much conflict in the decisions, not only in this Court but also in other Provinces of India and their Lordships have recognized that even in the decisions in the Privy Council there is not complete harmony. It seems to me after hearing the arguments in the present case, in the course of which we were referred to a vast number of judicial decisions, that it would be well if the Legislature would step in and settle the matter once and for all. I confess myself quite unable to reconcile the conflict even in the more recent decisions. In the absence of authority I should feel much inclined to hold that where a plaintiff claims under a deed executed by a member of a joint family alienating absolutely or partially (that is by sale or mortgage) the family property, the onus should lie upon him of showing the existence of circumstances which alone under Hindu law would justify the alienation, that is to say, "legal necessity" or a pious purpose. In cases where the alienation was made to meet an old or what might be called an "ancestral" debt I think that the Court would be justified in holding that proof of this fact would be at least *prima facie* sufficient evidence of legal necessity. Again, in the absence of authority, I should also be inclined to hold that under no circumtances could a member of a joint family alienate (wholly or partially) the family property for his own private debt, whether antecedent or otherwise. The creditor could, no doubt, sue the sons or grandsons and obtain a simple money decree and sell the property, in execution, but he would not acquire the priority and other rights that a mortgage gives. Were it possible so to hold, it seems to me that effect could be given in a measure at least to the two admitted principles of Hindu law stated above. It is however impossible having regard to the ruling of their Lordships in the case of *Nanomi Babuasin* v. *Modhun Mohun* (1)

(1) (1885) I. L. R., 13 Calc., 21.

to hold that under *all* circumstances it is necessary for the creditor to prove legal necessity. At page 35 of the report of the case of *Nanomi Babuasin* v. *Modhun Mohun* their Lordships say:— "Destructive as it may be of the principle of independent coparcenary rights in the sons the decisions have for some time established the principle that the sons cannot set up their rights against the father's alienation for an *antecedent* debt or against his *creditors' remedies for their debts* if not tainted with immorality." Unfortunately it is not very clear what their Lordships meant by the expressions "antecedent debt" or "creditors' remedies for their debts." Possibly their Lordships meant by "antecedent debts" ancestral debts and by "creditors' remedies for the debts" their Lordships meant the creditors' remedies for such debts, *i.e.* ancestral debts. The meaning of the expression "antecedent debt" has led to a conflict of decision between this Court and the Calcutta High Court. If the expression "antecedent debt" is to be construed literally, it would follow that a Hindu father might incur a debt for a private purpose and a few days after, mortgage the family property to secure that debt and the mortgage would be a good mortgage according to the judgment of their Lordships and binding upon the sons and grandsons. In the case of *Badri Prasad v. Madan Lal* (1), a mortgage of the family property was made to secure moneys advanced antecedently to a Hindu father, not as manager or for family purposes, yet it was held that the mortgagee was entitled to have the property sold, the debts not being tainted with immorality. This was the unanimous decision of a Bench of six judges of this Court, and it is binding upon us. It is probable that the advances in this case were made a considerable time before the mortgage, but once we hold that a private personal debt of a Hindu father can be an "antecedent" debt within the meaning of the expression in their Lordships judgment it is very difficult to understand on what principle money advanced a year or a week before (or even simultaneously with) the mortgage is not an "antecedent" debt. In the usual form of a mortgage in this country there is a recital that the mortgagor has taken a loan from the mortgagee and an hypothecation of the property follows; a mortgage in

(1) (1893) I. L. R., 15 All., 75.

1909

CHANDRADEO SINGH v. MATA PRASAD.

Richards, J.

most cases presupposes a debt. In the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) their Lordships of the Privy Council, referring to the case of *Muddun Thakoor* v. *Kantoo Lal* (2), say as follows :—This case then, which is a decision of this tribunal, is an authority for these propositions, 1st, that where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt his sons by reason of their duty to pay their father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted, and, 2ndly, that the purchasers at an execution sale being strangers to the suit if they have not notice that the debts were so contracted are not bound to make enquiry beyond what appears on the face of the proceedings." The result of these authorities seems to be that a creditor of the father of a joint Hindu family may sue the father alone, obtain a decree against him and sell the family property, and the sons (who are perhaps minors) cannot recover the property unless they prove that the debt was tainted with immorality and (where a stranger buys) the further fact that the purchaser had notice. Again, the father can himself sell or mortgage the property, not merely to raise money to pay off an antecedent debt, but he can also do so in consideration of or to secure an antecedent debt. I have already pointed out that in this Court, at least, we are bound to hold that the "antecedent debt" may be the private debt of the father and a debt which when it was incurred would not (according to the principles of Hindu law) have justified the alienation of the property, and this even if the sale was to the mortgager himself. It is impossible to reconcile this state of things with the admitted principle of Hindu Law that a father as a member of the coparcenary body has no power to alienate the family property without the consent of the other members save for legal necessity. It is contended that the existence of a debt, whether ancestral or private, implies "legal necessity." I cannot follow this contention. It might

(1) (1878) I. L. R., 5 Calc., 148. (2) (1874) L. R., 1 I. A., 333.

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TABLE OF CASES CITED.

PAGE.

PAGE.

well happen that a father possessed of ready cash or other moveable property might notwithstanding mortgage the family property to secure his own private debt. It seems to me that if the sons and grandsons are liable on a mortgage of the family property made to secure the private debt of the father incurred a year or two previously and if the sons and grandsons cannot set aside a sale made in consideration of such a debt, it ought to follow that they are equally liable on a mortgage made to secure a *bonâ fide* debt although incurred simultaneously with the making of the mortgage. It is said that such a decision destroys the principle of Hindi Law that the joint property can only be alienated for legal necessity or for a pious purpose. Perhaps this would be so if there was any principle left to destroy. In deciding in favour of the plaintiff I wish it understood that I only do so because I think that such a decision necessarily follows from the Full Bench ruling in *Badri Prasad* v. *Madan Lal*. If I could see any real distinction between the private debt of a Hindu father before the mortgage and a debt incurred simultaneously with the mortgage I would be glad to decide in favour of the defendants, which I think would be more in accord with the principle of Hindu Law that no member of a joint family can alienate save for legal necessity.

I would dismiss the appeal.

BY THE COURT.—The first question in the appeal having been determined by the majority of the Full Bench in favour of the appellants, the counsel representing the parties now ask that the appeal be referred back to the bench which referred the matter to a Full Bench for determination of the only other question remaining undecided. We order accordingly. The bench in question will finally determine the appeal including the question of costs.

1908
July 28.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr Justice Karamat Husain.

JANKI (APPLICANT) v. KALLU MAL AND OTHERS (OBJECTORS)*

Act No. VII of 1889 (Succession Certificate Act), section 1, clause (4), section 7, clause (3) - Certificate of succession - Grant of certificate opposed by party setting up a will - Procedure - Hindu law.

The widow of a deceased Hindu applied for a certificate of succession under Act No. VII of 1889. In opposition to this application an alleged will of the deceased was set up, and it was proved that the deceased, being of sufficient testamentary capacity, had, shortly before his death caused a draft will to be prepared, that he had had the draft read to him twice and explained to him, that he made it over to a person appointed a trustee under the will telling him to have it faired out and brought to him for signature, but that he died before this was done without having expressed any intention, except in one small particular, of wishing to alter the draft so made. The court below found in favour of the will and dismissed the application for a certificate.

Held on appeal that, although the lower court ought not to have tried any question beyond that of the existence of the will, as the conclusion that the deceased had made a will in the terms alleged by the objectors was justified by the evidence, the application for a certificate was rightly dismissed.

THE facts of this case are as follows :—

On the death of one Shadi Ram, his widow Musammat Janki applied for a certificate of succession under Act No. VII of 1889. Her application was opposed by Kallu Mal and others, who filed objections setting up a will alleged to have been made by the deceased. The evidence in support of the will so set up is detailed in the judgment of the court. The lower Court (District Judge of Meerut) considered the evidence adduced in support of the will, and finding that the will was valid dismissed the application before it for a certificate. The applicant appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondent.

RICHARDS and KARAMAT HUSAIN, JJ.—This appeal arises out of an application by Musammat Janki for a certificate under Act No. VII of 1889. Musammat Janki is the widow of one Shadi Ram, and *prima facie* she would be the person entitled to

* First Appeal No. 73 of 1907, from an order of L. Stuart, District Judge of Meerut, dated the 19th of April 1907.

a certificate under the Act. Her application however was opposed by Kallu Mal and others who filed objections setting up a will alleged to have been made by the deceas d. A draft was produced which is a draft of a somewhat elaborate will. Lachman Sarup was produced on behalf of the objectors, and deposed that he had written out this draft (which we will hereafter refer to as ex. A.) at the dictation of the deceased. He says that he explained the contents of the will to him, that it took him two days to prepare the document, and that at the close of each day he read it to the deceased. A doctor named Ram Chandar was also produced and he corroborated Lachman Sarup and said that four or five days before his death the deceased handed him Ex. A, which, he said, was a draft of his will. The deceased told him that he had appointed him a trustee under his will and asked him to take the draft and have it copied out fair for his signatu e. The deceased died without ever having executed the will. He wrote a letter to the Bank at Meerut giving certain directions as to a sum of Rs. 2,000 which he had in deposit with the bank which directions were strictly in accordance with his will. In this letter he says that he is making a will. It also appears that after the draft had been prepared the deceased wrote to Lachman Sarup about leaving Rs. 200 for a girls' school. The deceased seemed to think that he had mentioned this matter before. Lachman Sarup in reply told him that if he had mentioned it to him, he, Lachman Sarup, had forgotten it but that it might be added in the proper place. In the court below the appellant's case was that the deceased was not in his proper senses for a long time before his death. The deceased died on the 12th of January 1906. We think that had the application been made to us in the first instance, we should hardly have decided the validity or invalidity of the will on a summary application for a certificate. The Court might have exercised the discretion given to it by section 7, clause (3) of the Act; or the application might have been postponed and the objectors called upon to institute within a limited time a suit to obtain probate of the alleged will. The court however had undoubted jurisdiction to try the question whether or not there was a will. If the deceased had made a will in the terms alleged, the applicant Musammat Janki was not entitled to a

1908

JANKI v. KALLU MAL.

certificate. The court below having tried the question and heard all the evidence, we think that we would only be putting the parties to unnecessary expense and prolonged litigation if we were not now to decide in appeal the question already decided by the court below. We have no reason to think that further evidence could be produced on either side and we think that the court below was quite justified in believing the evidence adduced by the objectors as to the testamentary capacity of the deceased. The question remains whether or not he in fact made a will before he died. There cannot be the slightest doubt on the evidence that the deceased intended to make his will. We believe the evidence of Lachman Sarup and Dr. Ram Chandar. The deceased, according to their evidence, had dictated his wishes with regard to this property. He had written about the girls' school and the bequest in favour of it of course must now be deemed part of his will. There is no evidence of any kind that he intended to make any other change in the disposition of his property. *Dr. Tej Bahadur* urges that the testator might, if he had an opportunity, have altered his mind. There is no doubt he might and in the same way a man can always revoke or alter his will. But there is no evidence whatever that the deceased was in a state of doubt as to his intentions. We think it cannot be argued that the mere fact that he had not executed the document itself prevented what Lachman Sarup had taken down at his dictation from being his will. According to Hindu Law it is not necessary that a will should be executed by the testator. Under all the circumstances of the case we think the conclusion at which the court below arrived, namely, that Shadi Ram had before his death made a will in the terms alleged by the objectors, was justified by the evidence. We accordingly dismiss the appeal but without costs, as we consider that the objectors ought to have taken some steps to prove the will at an earlier date.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

1904
October 17

RICHARD ROSS SKINNER (PLAINTIFF) *v.* DURGA PRASAD AND ANOTHER (DEFENDANTS.)*

THOMAS WILLIAM SKINNER (DEFENDANT) *v.* RICHARD ROSS SKINNER (PLAINTIFF)

AND

THOMAS WILLIAM SKINNER (PLAINTIFF) *v.* DURGA PRASAD (DEFENDANT).

Will—Construction of document—Act No X of 1865 (Indian Succession Act), section 84—Devise to "eldest son and to his lawful male children according to the law of inheritance"—Marriage—Marriage between Christian and Muhammadan performed according to Muhammadan rites.

Thomas Skinner, domiciled in the North-Western Provinces, and owner of considerable landed property, died in 1865, leaving a will, made on the 22nd of October 1864, *i.e.*, before the passing of the Indian Succession Act, by which, amongst other dispositions, it was provided that—"my private zamindari, presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant, may at my demise descend to my eldest son, Thomas Brown Skinner and to his lawful male children according to the law of inheritance. In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above-mentioned private zamindari, *et cetra*, shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, *et cetra*, shall descend to my female children or in the event of their death, to the female children born in wedlock of my sons in succession."

Held that the construction of such a will was not governed by English Law or by the provisions of the Indian Succession Act, 1865, which was not retrospective; but the will was to be construed, as was laid down by the Privy Council in the case of *Barlow* v. *Orde* (1) according to principles of justice, equity and good conscience. So construing the will and having regard to the circumstances of the family at the time of its execution, the testator must not be taken to have intended to confer an absolute estate on his eldest son, but that his sons who should acquire the property should have a life estate only, and that the absolute estate should devolve upon the eldest son of the testator who should be entitled to the property for life and should leave a son surviving him. *Secretary of State* v. *The Administrator General of Bengal* (2), *Abraham* v. *Abraham* (3), *Broughton* v. *Pogose* (4), referred to.

Semble that a marriage ceremony performed according to Muhammadan rites between a Christian man and a Muhammadan woman can create no valid marriage between the parties.

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* First Appeal No. 123 of 1902, from a decree of A. Rahman, Subordinate Judge of Meerut, dated the 17th of March 1902, together with F. A. No. 19[illegible] and F. A. No. 107 of 1902.

(1) (1870) 13 Moo. I. A., 277.
(2) (1868) 1 B. L. R., 87, O. C.
(3) (18[illegible]) 9 Moo. I. A., 193, 1[illegible].
(4) (1873) 12 B. L. R., 74.

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

THE facts out of which these three appeals arose are fully set forth in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellant.

Messrs *C. Dillon*, *T. Conlan*, *B. E. O'Conor*, *Jogindro Nath Chaudhri*, *Ghulam Mujtaba* and *Durga Charan Banerji*, for the respondents, in F. A. No. 123.

Messrs. *T. Conlan*, *B. E. O'Conor* and Maulvi *Ghulam Mujtaba* for the appellant.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondent, in F. A. No. 106.

Mr. *T. Conlan*, Mr. *B. E. O'Conor* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *C. Dillon*, Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the respondent in F. A. No. 107.

STANLEY, C. J., and BURKITT, J.—These three appeals arise out of two suits which were brought in the Court of the Subordinate Judge of Meerut, one by Richard Ross Skinner against the Durga Prasad and Thomas William Skinner and the other by Thomas William Skinner against Durga Prasad to recover possession of the village of Sherpur in the district of Bulandshahr and for mesne profits; both of which suits were dismissed. Appeal No. 106 is an appeal by Thomas William Skinner in the suit brought by Richard Ross Skinner against the finding of the lower Court that he is not a legitimate son of the late Thomas Brown Skinner, who was the father of himself and brother of Richard Ross Skinner. Appeal No. 107 is an appeal by the same appellant in the suit which was instituted by him against the same finding, and also against the decision of the lower Court upon the construction of the will of the late Thomas Skinner, grandfather of the appellant. Appeal No. 123 is an appeal by Richard Ross Skinner in the suit instituted by him against the decision of the Court below holding that Thomas Brown Skinner took an absolute estate in the zamindari property of the testator, Thomas Skinner. The three appeals have been heard together, and one judgment will govern all.

Two questions, and two questions only, arise in the case. One is as to the true construction of the will of the late Thomas

Skinner, dated the 22nd of October 1864; and the other is the question of the legitimacy of Thomas William Skinner.

The founder of the family was Colonel James Skinner, C.B., an Indian soldier of fortune, who had for military services obtained from the East India Company in the beginning of the last century a grant of a large estate situate in the Bulandshahr District in the North-Western Provinces. The origin of the family is obscure. It appears from a suit which was instituted over thirty years ago to establish the will of Major James Skinner, an illegitimate son of Colonel Skinner, that it was then alleged, and there was some proof, that Colonel Skinner was illegitimate, being probably the child of a native woman by a European father. That case went on appeal to their Lordships of the Privy Council, and it is to be found reported in 13 Moore's Indian Appeals, p. 277, and is entitled *Musammat Fanny Barlow* v *Sophia Eveline Orde*. In the course of his judgment in that appeal Lord Westbury observes of the origin of Colonel Skinner as follows:—His origin is unknown; being illegimate he belonged to no family, and all that can be collected is that he was probably a soldier of fortune who rose by his courage and military skill to some distinction in the service of the East India Company." The testator in the present case, Thomas Skinner, is a son of Colonel James Skinner. He was a resident of Bilaspur in the Bulandshahr district, and at the time of his death, which occurred on the 9th of November 1864, was possessed of immovable property of considerable extent and value. The testator had three sons and four daughters by his wife Eliza Ann Skinner, of whom Thomas Brown Skinner was the eldest son and Richard Ross Skinner the second son. It appears that Thomas Brown Skinner was born before the marriage of his parents, and so was illegitimate. By his will, which is divided into seven paragraphs, Thomas Skinner provided for the payment of his debts and an annuity for his wife, and also allowances for his children, and then as to his zamindari he gave the following directions in the fourth and fifth paragraphs, namely:—"That my private zamindari, presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

time to time to the original grant, may at my demise descend to my eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance. In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above mentioned private zamindari, *et cetra*, shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, *et cetra*. shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession." The will was executed on the 22nd of October 1864, that is, 18 days before the testator's death. After his death his son Thomas Brown Skinner succeeded to the property, but he did not enjoy it long. He appears to have been of extravagant tastes and soon became immersed in debt. In execution of a simple money decree obtained against him by Durga Prasad his interest in the property in dispute in these appeals was sold and purchased by Durga Prasad. It is contended on behalf of the latter that upon the true construction of the will of Thomas Skinner his son Thomas Brown Skinner acquired an absolute estate in the property, and that he (Durga Prasad) is entitled now by virtue of his purchase to an absolute estate. Thomas William Skinner, alleging that he is the legitimate son of Thomas Brown Skinner, contends that his father had merely a life estate in the property and that upon his death the property devolved upon him. Richard Ross Skinner also supports the contention of Thomas William Skinner that his father had only a life estate, but he alleges that Thomas Brown Skinner is illegitimate, and consequently is not entitled to the estate, and he claims it as being the eldest legitimate son.

The learned Subordinate Judge has found that Thomas William Skinner was illegitimate, but he has decided that, according to the true construction of the will of Thomas Skinner, Thomas Brown Skinner took an absolute estate, and consequently Durga Prasad is now entitled to the property absolutely. He therefore dismissed both suits. Hence the present appeals.

There are two questions therefore now before us. The first is as to the true construction of the will of Thomas Skinner in regard to the devise of his immovable property, and the second

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

is as to the legitimacy of Thomas William Skinner. We shall first deal with the will. The testator died before the passing of the Indian Succession Act of 1865, so that that Act does not aid us in the matter. His domicile was in the North-Western Provinces of India, and there is no particular law of that domicile applicable to this case. The Privy Council held in the case of *Barlow* v. *Orde*, to which we have made allusion, and which had to do with the will of Colonel James Skinner, son of the founder of the family, that having regard to the circumstances of the family it was impossible "to affirm that any particular law is applicable to the construction of the Colonel's will or the regulation of his succession" and that "any question that may arise respecting them must therefore be determined by the principles of natural justice." That case, their Lordships held, fell to be decided, as directed by the Regulations, by the principles of natural justice, equity and good conscience. There was nothing before their Lordships in that case to indicate the religious belief or profession of Colonel Skinner or of his family. In the case of the testator Thomas Skinner and his family the evidence shows that they were Christians, but we do not think that this fact would justify us in interpreting his will upon any other principles than those which were applied in the case of *Barlow* v. *Orde*. We do not think that we should apply to its interpretation any technical rules of construction such as are applicable to English wills. The territorial law of British India is not strictly speaking English law but a modified form of English law—*The Secretary of State* v. *The Administrator General of Bengal* (1), *Abraham* v. *Abraham* (2), and *Broughton* v. *Pogose* (3). It was contended before us by the learned counsel for the respondent Durga Prasad that the will should be construed according to English law, and that according to that law, under the rule in *Wild's* case (6 Coke, 17), Thomas Brown Skinner took an estate tail, and that, as we understand the argument, such an estate must be regarded as an absolute estate in these Provinces, where estates tail are unknown. The qualified estate known as an estate tail had its origin in the ancient feudal system, the foundation of English jurisprudence as regards landed property. That system finds

(1) (1868) 1 B. L. R., 87 O. C. (2) (1863) 9 Moo. I. A., 193, 199.
(3) (1873) 12 B. L. R., 74.

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

no place in the territorial law of these Provinces. In Western India a land tenure is to be found closely resembling it, as, for example, the *Jaghirs* of the Mahratta country, but in these Provinces no such tenure exists. If it had been possible to create an estate tail in the land and the estate so created vested in Thomas Brown Skinner was such an estate, the case of the respondent Durga Prasad would not, as it appears to us, be advanced, for that estate was never barred, if there existed a means of barring it, and consequently on the death of Thomas Brown Skinner it passed on to the next heir. The learned counsel for Durga Prasad recognized this difficulty and was obliged to call in aid of his argument the provisions of section 84 of the Indian Succession Act of 1865, asking us to hold that words which in a devise of land in England would confer an estate tail would in this country pass the whole interest of the testator. He asked us to apply this section as if the Act had retroactive operation. Under that section, unless a contrary intention appear by a will, the whole interest of a testator will pass under a gift to a man and the heirs male of his body, words which in England are appropriate to confer an estate tail. We cannot accede to this argument. The Succession Act is not retroactive, and even if it were, the section in question is only applicable if a contrary intention does not appear by the will. Now the rule in *Wild's* case is based upon the presumed intention of the devisor that the children of the devisee should take the property, and that, inasmuch as they cannot take as immediate devisees, inasmuch as they are not in existence, and by way of remainder they cannot take, for that was not the devisor's intent, the gift being immediate, therefore the word "children" shall be taken as a word of limitation. The rule is only a rule of construction, but it is a rule which in England will not be departed from in cases properly falling within its scope—*Clifford* v. *Koe* (1) but it has been frequently criticised as a rule which in many instances has defeated the intention of testators. That eminent lawyer Sir Edward Sugden, when Lord Chancellor of Ireland, in the case of *Heron* v. *Stokes* (2) suggested that the more natural construction of a gift to a man and his children, there being no

(1) (1880) 5 A. C., 447. (2) (1842) Dr. and War., 89, s. c. 59, R. R. 652.

children *in esse* at the time, and that which he would have adopted in the absence of authority the other way would be to hold it to be a good gift to the parent for life with remainder to the children. Now the primary object in construing a will is to ascertain the intention of the testator. In order to gather what the intention of the testator was in regard to the disposition of his zamindari we must read the fourth and fifth paragraphs of his will together. In the fourth paragraph he directs that it shall descend to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance. The words "according to the law of inheritance" must not be overlooked. They seem to indicate that the children of Thomas Brown Skinner were objects of the testator's bounty, and that the words "lawful male children" were not used merely as words of limitation, that the testator's intention was that they should enjoy the property after the death of their father *according to the law of inheritance;* that is, that the eldest son living at the father's death should succeed to the estate. If the words to "his lawful male children" are treated as words of limitation merely, that is, as marking out the estate which Thomas Brown Skinner was to enjoy, the words "according to the law of inheritance" are unnecessary and out of place. The learned Subordinate Judge does not appear to us to have attached due weight to these words, or to have properly interpreted them. He says :—"Now he (the testator) does not say that his eldest son, Thomas Brown Skinner, should only have a life interest, and we have no right to import into the will those words. Then again, when he says clearly that the property should descend to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance, we all know that according to the law of inheritance the eldest son of Thomas Brown Skinner does not take only a life interest." The answer to this is that the testator did not give the estate to Thomas Brown Skinner according to the law of inheritance, but he gave it to Thomas Brown and to his lawful male children according to that law. The words "according to the law of inheritance" are not so much applicable to and explanatory of the gift to Thomas Brown Skinner

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

as they are of the gift to his lawful male children. If the testator had intended to give the property absolutely to Thomas Brown Skinner, the introduction of the words "and to his lawful male children" was quite unnecessary and inappropriate. The succeeding paragraph makes this more clear. By it the testator provides that if Thomas Brown Skinner should die without lawful male children his property should descend to the testator's next male heir, *i.e.*, to his second, or other son who should be living at the death of Thomas Brown Skinner. Then follows the provision that if all his sons should die without lawful male children, the zamindari should descend to his female children, and in default of such children, then to the female children of his sons in succession. Reading these two paragraphs together, it appears to us that it was clearly not the intention of the testator to give an absolute estate in his zamindari to Thomas Brown Skinner. The testator indicates his wish that his sons who shall acquire the property shall have a life estate only and that the absolute estate shall devolve upon the eldest son of the son of the testator who shall be entitled to the property for life and shall leave a son surviving him.

In order to gather the intentions of the testator we must place ourselves in his position and see what were the circumstances of the family, the will was made shortly before his death. He had a wife, Eliza Ann Skinner, and six children, namely, three sons and three daughters. Of these children the two eldest Thomas Brown and a daughter Jane Sophia were not born in wedlock, the testator having been married to their mother after their birth. It seems highly improbable that, if the intention of the testator was to give his eldest son an absolute estate, he should have introduced into his will elaborate provisions for the devolution of the property such as are contained in paragraphs 4 and 5 of the will. If such was his intention he would not, we think, have gone on to provide for the devolution of the property, not merely in the event of the death of Thomas Brown Skinner, in his (the testator's) lifetime, but for the succession of daughters in the event of his sons dying without male issue. It is evident that the testator was desirous that his zamindari should be retained in the family, and this was not unnatural seeing that it had been

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

given to him as a reward for public services. In the 6th paragraph of his will, in which he makes provision for the payment of his debts, he directs that "on no account shall my private zamindari, *et cetera*, be sold to pay such debts." Reading the will as a whole and taking into consideration the circumstances, we have no hesitation in holding that Thomas Brown Skinner took merely a life estate and not an absolute estate in the property.

[*The remainder of the judgment, dealing entirely with matters of fact, is not reported. But see Weekly Notes* 1904, *p.* 213.—*Ed.*]

1908 *December* 21.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

ROBERT SKINNER AND OTHERS (DEFENDANTS) *v.* CHANDAN SINGH, AND ANOTHER (PLAINTIFFS) AND BESHUN AND OTHERS (DEFENDANTS).*

Act No. I *of* 1872 *(Indian Evidence Act), section* 35—*Regulation No. VII of* 1822, *section* 9—*Duties of Collectors and Settlement Officers—Entries in khewats and khataunis.*

Under the provisions of Regulation No. VII of 1822 settlement officers had to ascertain "the real nature and extent of the interests held, more especially where several persons may hold interests in the subject-matter of different kinds or degrees", *held* that this included the case of mortgagors and mortgagees.

Held also that entries in *khewats* and *khataunis* made at settlements under Regulation No. VII of 1862 are admissible in evidence under section 35, Indian Evidence Act, 1872.

THE facts of the case are as follows:—

The plaintiffs brought the suit on the allegation that the property in dispute was mortgaged under a mortgage-deed, dated the 21st of April 1847, to the predecessors of the defendants and that the plaintiffs, as the representatives of the mortgagors, were entitled to redeem the mortgage. The plaintiffs not being able to produce a copy of the mortgage-deed, relied upon certain entries in the revenue papers prepared at the settlements which showed the defendants and their predecessors to be mortgagees of the property in dispute. The contesting defendants pleaded that they were in proprietary possession of the land in dispute, that the entries in the revenue papers were incorrect and that those entries were not admissible in evidence. The court below decreed the suit. The defendants appealed.

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* First Appeal No. 111 of 1907, from a decree of H. David, Subordinate Judge of Meerut, dated the 16th of February 1907.

1908

ROBERT SKINNER v. CHANDAN SINGH.

Mr. *B. E. O'Conor* (with him Maulvi *Ghulam Mujtaba*), for the appellants, contended, *inter alia*, that the entries on which the plaintiffs-respondents relied were not admissible in evidence and that the settlement officers went beyond the limit of their powers in recording these entries.

Pandit *Moti Lal Nehru* (with him Mr. *Ismail Khan*), for the respondents, submitted that these entries were admissible in evidence having been recorded in accordance with Regulation VII of 1822. He cited *Lekraj Kuar* v. *Mahpal Singh* (1), *Isri Singh* v. *Ganga* (2) and *Muhammad Hasan* v. *Munna Lal* (3).

Ghulam Mujtaba replied.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was a suit for the redemption of a mortgage, dated the 21st of April 1847, stated to have been executed in favour of certain members of the Skinner family to secure a sum of Rs. 6,288. On payment of this sum the property was according to the evidence to be redeemable. The plaintiffs are admittedly some of the heirs of the mortgagors and entitled to redeem if they can establish that the property is in the possession of the defendants mortgagees as mortgagees by virtue of the alleged mortgage. The learned Subordinate Judge of Meerut after consideration of the evidence adduced in support of the plaintiff's case passed a decree for redemption. From this decree the present appeal has been preferred and the only question before us is as to the sufficiency of evidence adduced for the plaintiffs in proof of alleged mortgage.

[Their Lordships then discussed the evidence and proceeded].

It appears that in the year 1833 a settlement of the property in question with other property was made under the supervision of Mr. Elliot as settlement officer, and in the *khewat* prepared on the occasion of that settlement the predecessors in title of the plaintiffs are shown to have been the owners of the property in dispute. In the next settlement described as the settlement of Mohur Singh, which was prepared during the years 1853 to 1858, the predecessors in title of the defendants mortgagees,

(1) (1879) I. L. R., 5 Calc., 744. (2) (1880) I. L. R., 3 All., 876. (3) (1886) I. L. R., 8 All., 434.

whom we shall shortly describe as the Skinner family, are mentioned as "mortgagees of the property" whilst the alleged mortgagors are specified as "mortgagors." This is the settlement which followed that of Mr. Elliot in which there is no reference to the mortgage in favour of the members of the Skinner family. In a subsequent specification of shares of the property in dispute, prepared in the year 1276 *Fasli*, corresponding to the year 1869, we have entries in which not merely is the mortgage referred to but the details of it are given. In column 4, in which are recorded the names of co-sharers, several members of the Skinner family, whom it is unnecessary to mention particularly, are described as owners of five shares in all. They are described as "Europeans, residents of Bilaspur, mortgagees of the property of Durjan Singh and Bhag Singh, sons of Kunwar Singh, mortgagor. This property has been jointly mortgaged under mortgage-deed for Rs. 6,288, dated the 21st of April 1847, along with that of Har Sahai and others. When the mortgagors shall pay the entire amount, the mortgage shall be redeemed." Later on in this document under serial No. 5 of the *khata* a similar entry appears. We find from the endorsement, that this *khewat* was prepared with the consent of the proprietors and verified. There is also this endorsement upon it:—"To-day, all the proprietors verified this *khewat* in my presence and they raised no objection." It thus appears that all the parties including the Skinner family verified the *khewat* and the entries in it, and admitted that the entries were correct. We further find from this *khewat* that members of the Skinner family held portion of mauza Tatarpur as proprietors. At serial No. 19 of the *khata* Musammat Victoria, daughter of Mr. George Skinner, and others are described as owners of that *khata* in equal shares, and opposite serial No. 22 of the same *khewat*, Captain Hercules Skinner and others are described as owners in equal shares of that *khata*, being vendees of the property of Munawar Ali and Habib Ali, vendors. Thus we gather from this *khewat* that not merely the members of the Skinner family held portion of the property as proprietors but also were entitled as mortgagees to other portions. In addition to this, in the *khatauni* of 1273 *Fasli*, corresponding to the

1908

ROBERT SKINNER v. CHANDAN SINGH.

years 1868 and 1869, we find an entry containing particulars of the mortgage corresponding with the entry in the *khewat* to which we have already referred. In it (opposite to serial No. 6) Musammat Victoria and other members of the Skinner family are described as mortgagees of the property of Durjan Singh and Bhag Singh, sons of Kunwar Singh mortgagor, deceased, and it is stated that the property has been jointly mortgaged under a mortgage-deed, dated 21st of April 1847, to secure Rs. 6,288 along with the property of Har Sahai, and then there is this entry that "when the mortgagors shall pay the entire amount the mortgage shall be redeemed." In this document at serial No. 11, Musammat Victoria and other members of the Skinner family are shown as owners in equal shares of certain portion of the property to which the *khatauni* has reference and they are represented as owning that property under a decree against one Hasina. Again at serial Nos. 14, 19, 23 and subsequent numbers, the mortgage of the 21st of April 1847 is referred to and in serial Nos. 158, 159 and other numbers some of the members of the family are described as owners being vendees of the property of Munawar Ali and Wasiat Ali, vendors. From this document also it is evident that the members of this family acquired portion of the property by sale in addition to the property which they held as mortgagees.

It is said that these entries were made by the settlement officer in excess of his authority and a great part of the argument addressed to us has been devoted to this question. The settlements in question were prepared when Regulation No. VII of 1822 was in force and we have to see whether in view of the provisions of that Regulation the settlement officer had authority to give the particulars to which exception is taken by the learned counsel for the appellants. The language of this Regulation is extremely wide. In the section which deals with the duties of Collectors and other officers exercising the powers given by the Regulation (namely section 9), we find the following direction:—"The proceedings shall embrace the formation of as accurate a record as possible of all local usage connected with landed tenures, as full as practicable a specification of all the persons enjoying possession and property

of the soil or vested with any heritable or transferable interest in the land or the rents of it, care being taken to distinguish the different modes of possession and property, and the real nature and extent of the interest held, more specially where several persons may hold interest in the same subject-matter of different kinds or degrees," and later on in that section there is a direction that the information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the courts of judicature." This last mentioned direction leads us to think that the information which was directed in the earlier portion of the section to be collected was intended to be utilised in the courts of justice in determining the rights of litigants before them. It appears to us that in view of *the wide language used in this section we cannot hold that the* entries (to which we have referred) in the *khewats* and *khataunis* are not admissible in evidence in proof of the relations existing between the Skinner family and the plaintiffs. The officers exercising the powers conferred by the Regulation were directed to ascertain "the real nature and extent of the interests held, more specially where several persons may hold interests in the same subject-matter of different kinds or degrees." These words seem to us peculiarly applicable to the case of mortgagors and mortgagees whose interests in property are of different kinds or degrees. Therefore we think that the evidence afforded by these documents is good secondary evidence of the matters sought to be established in the case. Read in conjunction with section 35 of the Evidence Act, we think that the court below properly admitted them in evidence.

But the case does not rest on these entries alone. We have a *wajib-ul arz* of the year 1303 *Fasli*, corresponding to the year 1896 A.D, inwhich the mortgage in question is mentioned. In that *wajib-ul-arz* in the paragraph which treats of the custom prevailing as to division of profits we find the following statement: "lands Nos. 9, 8, 7, 5 and 2 have since the 21st of April, 1817, been in the possession of Mr. Robert Skinner and others, the morgagees by virtue of a mortgage", and later on "the joint *mal* and *siwai* items in respect of the property held by a single proprietor are collected, by the single proprietor, in respect of the

1903

ROBERT SKINNER v. CHANDAN SINGH.

property held by co-sharers who are joint in food and business, by the head of the family, in respect of the mortgaged property, by the servant of Mr. Robert Skinner and others, the mortgagees, and in respect of the partitioned property by all the co-sharers." This *wajib-ul-arz* was duly attested on the 16th of June 1897. We may also refer to the *khewat* of the village of Tatarpur for the year 1303 *Fasli*. In that *khewat* we find members of the Skinner family described as sharers in the village and in the 6th column they are thus described "sons and daughters of Mr. Stewart Skinner *alias* Nawab Mirza, Europeans, residents of Meerut, mortgagees." Later on, opposite serial No. 5, Changa and Sumera, sons of Gulab Khazan, son of Lakhan, are described as "mortgagors to Mr. Robert Skinner *alias* Sardar Mirza and others, entered in *khata* No. 2 mortgagees." Now this *wajib-ul-arz* was prepared under the provisions of the Land Revenue Act of 1873, Act XIX of the year, and any entry contained in it would be *prima facie* evidence of its accuracy. Section 91 of that Act provides that "all entries on the record so made and attested shall be presumed to be true until the contrary is proved." Even therefore if the earlier *khewat* to which we have referred, were not good *prima facie* evidence of the mortgage in question, we think that the later *khewat* for the year 1896 would in the absence of evidence to the contrary, establish the fact that the Skinner family were mortgagees of the property in suit. We find similar entries in the closing *khewat* for the year 1310 *Fasli*, corresponding to the year 1903.

[Their Lordships then discussed the documents.]

Having regard to all this evidence we think that the decree of the court below was right and we therefore dismiss the appeal with costs, including fees in this court on the higher scale.

Appeal dismissed.

FULL BENCH.

1909.
January 14.

Before Mr. Justice Sir George Knox, Mr. Justice Aikman, and Mr. Justice Griffin.

BHAWANI SINGH (DEFENDANT) *v.* DILAWAR KHAN, (PLAINTIFF.)*

Act (Local) No. II of 1901, *(Agra Tenancy Act), section* 201(3)—*Presumption—Suit for profits in Revenue Court—Question of title decided by Civil Court.*

In a suit for profits the defendants pleaded that the plaintiff had no title to certain plots. The Assistant Collector partially decreed the claim. The defendant thereafter and when an appeal was pending before the District Judge obtained a declaration of title to the plots from the Civil Courts. The lower Appellate Court held that without correction of the *khewat* the Civil Court's decree could not be given effect to in the Revenue Court.

Held that when as between parties to a revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. *Durga Shanker* v. *Gur Charan* (1) followed.

THE facts of this case are as follows:—

The respondent instituted a suit for profits. The appellant pleaded that the plots for which profits were claimed had been wrongly included in plaintiff's *patti*. The Assistant Collector without framing an issue as to title partly decreed the claim. The plaintiff filed an appeal against the portion of the claim dismissed and the defendant preferred objections under section 561 of the Code of Civil Procedure 1882. In the meantime the defendant sued the plaintiff in the Civil Court for a declaration of title to the plots in question and obtained a decree. The lower courts in spite of this decree of the Civil Court repelled the defendant's contention holding that until the defendants got the village records corrected profits must be calculated on the recorded shares in the khewat. The defendant appealed to the High Court.

The appeal was referred to the Full Bench on the recommendation of Richards and Griffin, JJ.

Munshi *Gulzari Lal*, for the appellant, argued that in view of the decision of the Civil Court the plaintiff was not a co-sharer

(1) Weekly Notes, 1903, p. 1.

1909

BHAWANI SINGH v. DILAWAR KHAN.

in the plots in dispute. The Assistant Collector was bound to decide the issue raised by the defendant. Whatever meaning might be attached to the words "shall presume" in section 201 of the Agra Tenancy Act, the point could not be raised here as the defendant had already gone to the Civil Court and got a decree in his favour. The last proviso to that section did not say that the suit in Civil Court was to be brought after the decision in the profits case became final. It could be brought at any time, and the defendant brought the suit immediately after the decision of the first court. He referred to section 40 of the Land Revenue Act.

Dr. *Tej Bahadur Sapru*, for the respondent, argued that the plaintiff's name was still recorded as co-sharer, and the Revenue Courts being courts of special jurisdiction could not ignore the entry in the Revenue registers. If they did many sorts of difficulties might arise. The mere fact that a decision in favour of the defendant was passed by a Civil Court did not give the Revenue Court power to ignore the entry unless the person who obtained the decree got the entry corrected. He referred to sections 32 (1), and 33 of the Land Revenue Act. If the record of rights was in plaintiff's favour he would be entitled to a decree. If the defendant could rely on the decision of the Civil Court the provisions of section 33, Land Revenue Act, would become useless, as it would not be necessary for him to file any application under that section. He further submitted that under clause 3 of section 201, the presumption was absolute in spite of the decree of the Civil Court. The difficulty which has arisen in this case would be obviated if the person obtaining the decree of a Civil Court took the trouble of getting the entry in the Revenue register corrected.

The following judgments were delivered :—

KNOX, J.—The plaintiff respondent in this second appeal claims to be co-sharer to the extent of one half share in a *patti* which consists of 5 biswas in mahal Alaidapur. Mahal Alaidapur consists of two *pattis*, one the *patti* just mentioned above, and the second a *patti* of 15 biswas.

Upon plaintiff's instituting the suit, out of which this appeal arises, for his share of the profits which accrued due and payable

on account of the years 1309 to 1311 *Fasli*, the defendant, now appellant, pleaded *inter alia* that certain plots which originally formed part of the 15 biswa *patti*, had been wrongly included in the 5 biswa *patti*. If these plots were taken out, it would be found that the respondent was entitled to no profits in the years in dispute. The suit was instituted on the 11th day of April, 1905, in the court of the Assistant Collector. This officer without framing any issue upon the plea above mentioned, as raised by the appellant, gave the respondent on the 10th of May 1905, a decree but not for the full amount claimed by him for reasons with which I am not concerned in this appeal.

The plaintiff filed an appeal to recover the amount which had not been decreed and the defendant in a memorandum of objections again raised the plea already mentioned. On the 2nd of August 1905, the District Judge by an order passed under section 566 of the Code of Civil Procedure directed the Assistant Collector to try the issue raised in defendant's written statement and on the 24th of March 1906, he returned a finding to the effect that there was no evidence on the file that there had been any interchange of plots between the two *pattis*.

In the interval, the defendant had sought relief in the Civil Court, and had filed a suit for a declaration that the plots mentioned in his defence in the Revenue Court really belonged to the 15 biswa *patti*, and on the 19th of March 1906, he got the declaration he had asked for and promptly produced it before the Assistant Collector. That court in spite of this decree found as I have already said that there was no evidence.

The District Judge on the 28th of June 1906 accepted the finding of the Assistant Collector, and as regards the decree of the Civil Court, dated 19th March 1906, to which his attention was called, held that until the defendant had got the village records altered in terms of that decree, no effect could be given to it in a suit of this nature, and that the profits must be calculated on the recorded shares as they then stood according to the *khewat*.

The decision of the 19th March 1906, was finally upheld by this Court in Second Appeal on the 6th of May 1908.

1909

BHAWANI SINGH v. DILAWAR KHAN.

The defendant has in this Second Appeal which he filed on the 3rd of November 1906, again raised the question regarding the transfer of the plots and contended that the Revenue Courts should have read the entries in the village records subject to the Civil Court's decree.

It was at first thought that the decision of the question here raised turned upon the interpretation which should be put upon clause (3) of section 201 of Local Act No. II of 1901. That clause has been differently interpreted by learned Judges of this Court—see *Dil Kunwar* v. *Udai Ram and others* (1), *Dhanka* v. *Umrao Singh* (2), and *Banwari Lal and another* v. *Niadar* (3). But in my opinion whichever of these two interpretations be put upon clause (3) of section 201, it matters little so far as this appeal is concerned. Before the Assistant Collector made his return to the District Judge on the 24th of March 1906, he had before him in Court and on the file of the record the judgment *inter partes* of a Court of competent jurisdiction to the effect that the plaintiff had no proprietary right to the plots mentioned in the written statement of the defendant.

The concluding words of section 201 of the Local Act No. II of 1901 in clear terms reserves the right of any person to establish by suit in the Civil Court that the plaintiff who has instituted a suit under the provisions of Chapter XI of Act No. II of 1901 (and the plaintiff in the case was so suing) had not the proprietary rights he claimed to have, at any rate in the whole as he claimed it.

We have already in the case of *Durga Shanker* v. *Gur Charan and another* (4) held "that when as between parties to the revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff, who claims profits, the Revenue Court is not competent to ignore that decision."

For these reasons I would reverse the decree of the District Judge on this preliminary point and remand the case under order XLI, rule 23, with directions to re-admit the appeal under its original number in the register and to proceed to determine it on its merits. Under the circumstances costs should abide the result.

(1) (1906) I. L. R., 29 All., 148.
(2) (1907) I. L. R., 30 All., 58.
(3) (1907) I. L. R., 29 All., 153.
(4) Weekly Notes 1905, p. 1.

AIKMAN, J.—I concur in the judgment of my learned colleague and in the order proposed by him and have nothing to add.

GRIFFIN, J.—I also concur.

BY THE COURT.—The decree of the District Judge on the preliminary point is reversed and the case remanded under order XLI, rule 23 of the Code of Civil Procedure (Act V of 1908) with directions to re-admit the appeal under its original number in the register and to proceed to determine it on the merits. Costs will abide the result.

1909

BHAWANI SINGH v. DILAWAR KHAN.

Appeal decreed and cause remanded.

Before Mr. Justice Sir George Knox, Mr Justice Aikman and Mr. Justice Griffin.

1909. *January* 14.

GOBINDI (PLAINTIFF) v. SAHEB RAM AND ANOTHER (DEFENDANTS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 201 *(3)—Presumption—Question of title decided by Civil Court—Subsequent suit for profits by recorded co-sharers.*

When a Civil Court of competent jurisdiction has decided a claim to property, and this has been followed by a wrong entry in the revenue papers, *held* that in a subsequent suit for profits the claim must be in proportion to the share obtained under the Civil Court decree and no presumption arises under section 201 of the Agra Tenancy Act.

THE facts of this case are as follows :—

The plaintiff in 1901 obtained certain shares in immovable property under a decree of the Munsif of Hathras. She applied for entry of her name in the revenue papers but owing to some error her name was recorded in respect of a larger share than she had obtained under the decree. She sued the defendants for profits calculated on the share as entered in the Revenue papers. The defendants pleaded that the plaintiff was entitled to profits in proportion to the share decreed in her favour and not as entered in the *khewat*. The Court of first instance decreed the claim for profits in her favour in proportion to her recorded share. The lower appellate Court (Additional Judge of Aligarh) modified the decree holding that the plaintiff was entitled to profits proportionate to the share she had got under the Civil Court decree. The plaintiffs appealed to the High Court.

* Second Appeal No. 942 of 1907, from a decree of Khetter Mohan Ghosh, Additional Judge of Aligarh, dated the 8th of June 1907, reversing a decree of G. Flowers, Assistant Collector 1st Class, of Aligarh, dated the 21st of November, 1906.

1909

GOBINDI
v.
SAHEB RAM.

The appeal was referred to the Full Bench on the recommendation of RICHARDS and GRIFFIN, JJ.

Dr. *Satish Chandra Banerji*, for the appellant, submitted that the plaintiff's name was entered in respect of a half share by a competent Revenue Court after a consideration of the decree of the Civil Court and the objections preferred by the present defendants. The latter submitted to the order of the Assistant Collector, which became final. That order could not now be treated as a nullity, and the Revenue Court under section 201 (3), Agra Tenancy Act, was bound to give effect to the mutation of names carried out in pursuance of that order.

Section 201, Tenancy Act, provides for two classes of cases, namely, (1) where the name of the plaintiff is not recorded and (2) where the name is recorded in the Revenue papers. Where, the plaintiff's name has already been put upon the record by the Revenue Court, in a subsequent suit before the same court, it is not called upon to embark upon a further enquiry, but is entitled to act upon the entry as conclusive for its purposes. Sections 44 and 57 of the Land Revenue Act show that there is a rebuttable presumption in favour of the truth of entries in Revenue papers, and if the legislature intended no higher presumption than that provided for in those sections, it was not necessary to enact section 201 (3), Tenancy Act. The words "shall presume" were not terms of art or technical words known to the common law of England or elsewhere. Taylor, for instance, in part I, Chapter V, of his *Law of Evidence*, had not used that expression though he had classified presumptions of law as conclusive and disputable. The expression "shall presume" had not been defined in the Tenancy Act or the General Clauses Act. There was a definition in the Indian Evidence Act, but as that Act was not *in pari materia* with the Tenancy Act there was no warrant for interpolating that definition into the Tenancy Act. The intention of the legislature being clear should be given effect to, as the words used were capable of bearing the meaning which the legislature intended and there was nothing in the context or the scheme of the Tenancy Act which compelled the Court to defeat the obvious intention of the legislature by putting a restricted meaning upon the words used.

See *Budge* v. *Andrews* (1), *Umachurn* v. *Ajadannissa*, (2) *Q.-E.* v. *Hori* (3). Where the legislature had intended only a rebuttable presumption in the Tenancy or the Land Revenue Acts, it had been careful to qualify the words "shall presume" by other words like "until the contrary is shown" [section 35, 108 (2), Act II of 1901]. In section 9 of that Act the words "conclusive proof" had been used, but the entry in that case was conclusive for all courts and no right of civil suit in favour of any party had been reserved. The plaintiff who had succeeded in getting his name recorded in Revenue registers should not be placed in a worse position than one who had failed to do so, as he clearly would be if the Revenue Court had power to determine the question of title adversely to him and he had no right to obtain an adjudication from the Civil Court. The object of the legislature was that Revenue officers should prepare the record of rights with care and abide by the same, and it was only if they did so that multiplicity of actions could be prevented.

He referred to *Dil Kunwar* v. *Udai Ram* (4), *Banwari Lal* v. *Niadar* (5), *Dhanka* v. *Umrao Singh* (6), *Niaz Ali* v. *Govind Ram* (7), *Bachan Singh* v. *Karan Singh* (8).

Munshi *Gulzari Lal*, for the respondents, submitted that there was a clear decree of the Civil Court deciding that the plaintiff was entitled to a definite share. This decree had become final and should be given effect to. Sections 199, 201, 202, Tenancy Act, show that the policy of the legislature was that questions of title were to be decided by the Civil Court and that decision was to bind the Revenue Court. Why should the parties here be referred again to the Civil Court? He submitted that the legislature did not mean a conclusive presumption by the words "shall presume" in section 201, Tenancy Act. Wherever the legislature meant a conclusive presumption, it used words like "conclusive evidence." He referred to Criminal Procedure Code (Act No. V of 1898), section 7; Land Acquisition Act (I of 1894), section 6; and the Criminal Tribes Registration Act (XXVII of 1871), section 6. In no other Act the words

(1) (1878) L. R., 3 C. P. D., 51, 531.
(2) (1885) I. L. R., 11 Calc., 430.
(3) (1899) I. L. R., 21 All., 391, 396.
(4) (1906) I. L. R., 29 All., 143.
(5) (1905) I. L. R., 29 All., 153.
(6) (1907) 4 A. L. J. R., 166; s. c. on appeal, I. L. R., 30 All., 53.
(7) Weekly Notes, for 1908, p. 157n.
(8) (1909) 5 A. L. J. R., 435

1909

GOBINDI v. SAHEB RAM.

"shall presume" have been used to mean a conclusive presumption. The argument based upon the proviso to section 201, was not sound, because the right of suit was given not to the defendant alone but to any person. The provisions of section 199 had not been made applicable to section 201(3), but if the plaintiff had the title it could not be taken away by an order of the Revenue Court. The Revenue Court did not sometimes correct an erroneous *khewat* even if moved to do so.

If the policy of the Act is not clear, the words "shall presume" should be interpreted in the sense in which they are ordinarily understood by lawyers in India. He referred to Maxwell, *Interpretation of Statutes*, p. 51; S. A., No. 358 of 1907 decided by Knox and Aikman, JJ., on May 27, 1908, *Dil Kunwar* v. *Udai Ram*, and *Dhanka* v. *Umrao Singh*.

Dr. *Satish Chandra Banerji* heard in reply.

The following judgments were delivered:

KNOX, J.—The facts out of which this appeal arises are as follows:—

The appellant Musammat Gobindi was plaintiff in the court of first instance. She brought the suit out of which this appeal has arisen to recover Rs. 397, principal and interest, on account of profits for the years 1310, 1311 and 1312 Fasli. She alleged that her share in the village Lahra was half, and that the defendants respondents owned the other half. The respondents replied that she had not correctly given the extent of her share, that under an arbitration award which had been made a decree of court, 73 bighas 3 biswas were given to her out of 89 bighas, 2 biswas, half of a 3 biswas *haqiat* in *khata khewat* No. 6 of mauza Lahra. Other matters were also urged in reply. But we are not concerned with those at present. The court of first instance held that the appellant's share was half 3 biswas as recorded in the *khewat*, refused to go behind the recorded share, and decreed profits in her favour in proportion to this recorded share. The lower appellate court refused to accept the entry in the *khewat*, held that it was an incorrect entry, that the appellant owned only 73 bighas 3 biswas of land, and that on this footing was entitled to no profits. It accordingly set aside the decree of the lower court and dismissed the plaintiff's suit. In appeal before us it has

been urged that as the appellant is a recorded co-sharer of half of 3 biswa share, she is under section 201, clause (3) of the Tenancy Act of 1901, entitled to a decree for the full amount claimed by her, that the court below could not go into the question as to whether the plaintiff's proprietary title was to be restricted to a lesser area than that recorded in the *khewat*. On this case coming before this court, it was at first thought that the decision of the questions raised in the appeal turned upon the interpretation to be put upon clause (3), section 201, of the Local Act No. II of 1901, and as that clause had been differently interpreted by learned Judges in this court in *Dil Kunwar* v. *Udai Ram* (1), *Banwari Lal* v. *Niadar* (2), and *Dhanka* v. *Umrao Singh* (3), the learned Chief Justice directed that the appeal should be laid before a Full Bench of this Court.

In view however of the fact that the extent of the proprietary rights of the appellant has been the subject of a decision by a Civil Court of competent jurisdiction, it seems to me that we need not in this case consider and that we ought not to consider the interpetation to be placed upon clause (3), section 201, of Act No. II of 1901. I refer to the decree passed by the Munsif of Hathras on the 8th of October 1901, in the suit brought by Musammat Gobindi against Saheb Ram and Birj Narain. That suit was referred to arbitration, and on the 8th of October 1901, the award was made a decree of court—and out of 89 bighas, 2 biswas, *i.e.* half of a 3 biswas *haqiat, khata khewat* No. 6 of mauza Lahra, now in dispute, 73 bighas 3 biswas were given to Musammat Gobindi and 15 biswas odd to Birj Narain. It was further added in the decree that Musammat Gobindi must pay Government revenue for the full half share of 89 bighas 2 biswas. This was followed upon the 19th of October 1901, by an application presented by Musammat Gobindi to the Revenue Court, for the entry of her name over 73 bighas 3 biswas *haqiat* out of 89 bighas 2 biswas of *khata khewat* No. 6 of mauza Lahra. The Tahsildar who made an inquiry recommended to the subdivisional officer that Musammat Gobindi's name should be entered as prayed for by her. The Assistant Collector acting upon this report on the 18th of

(1) (1903) I. L. R. 29 All. 143. (2) (1903) I. L. R. 29 All, 153.
(3) (1907) I. L. R. 30 All., 53.

1909

GOBINDI *v.* SAHEB RAM.

November 1902, passed an order to the effect that Musammat Gobindi's name be entered in the *khewat* as recommended by the Tahsildar. Owing to some error, however, Musammat Gobindi's name was entered in respect of 89 bighas odd. It has thus been established by suit in Civil Court that Musammat Gobindi has only proprietary right over 73 bighas 3 biswas and not over half share in *khata khewat* No. 6 of mauza Lahia. Owing to this decision of the Civil Court which was long prior to the date on which the present suit was instituted out of which this appeal arises, there is nothing left for the court to presume. The view taken by the lower appellate court is a correct view and in my opinion this appeal should be dismissed with costs.

AIKMAN, J.—I concur in the judgment of my learned colleague and have nothing to add.

GRIFFIN, J.—I also concur.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

1909 January 14.

MISCELLANEOUS CIVIL.

Before Mr Justice Aikman.

JAGAN NATH PRASAD, (DECREE-HOLDER) *v.* MULCHAND AND OTHERS (JUDGMENT-DEBTORS).*

Act No. VII of 1870 (Court Fees Act), section 5—Reference—Schedule I, Articles 4 and 5—Court fee—Interlocutory order—Review of.

Held that an application for review of an interlocutory order was properly stamped with a court fee stamp of Rs. 2 and that neither Article 4 nor Article 5 of schedule I of the Court Fees Act refers to an interlocutory order. *Bom. Printed Judgments*, 1892, p. 383 followed.

THIS was a reference by the Taxing officer to the Taxing Judge under section 5 of the Court Fees Act.

An application for review of an order passed by a Division Bench under section 566, Code of Civil Procedure, 1882, was presented on a court fee stamp of Rs. 2. The Stamp Reporter reported that the application was insufficiently stamped on the ground that the application being one for review of judgment should have been stamped under schedule I, article 4 of the Court Fees Act, and the proper fee was the fee leviable on the memorandum of appeal.

* Stamp Reference in Second Appeal No. 1143 of 1907.

The vakil for the applicant objecting to the report of the Stamp Reporter the case was referred to the Taxing Officer under section 5 of the Court Fees Act for decision. He made the following reference to the Taxing Judge on November 12th, 1908:—

"*The application is for the review of an order remanding a* case under the provisions of section 566 of the Code of Civil Procedure. The office report is to the effect that the fee as laid down by article 4, schedule I of the Court Fees Act, is payable. There *is no question that the application was filed after the ninetieth* day from the date of the High Court's order.

"The learned vakil *contends that this article does not apply* as the application refers to *an order* and not to a *judgment ending in a decree.*

"I would refer to the heading of chapter XLVII of the Code of Civil Procedure where the expression "Review of judgment" is used. Further I would point out that while the words decree or order are used in section 623, the word judgment is used in article 4 of the 1st schedule to the Court Fees Act. I think it is clear that this article applies to the review of all judgments under section 623, whether the judgments of which review is sought is of the nature of an order, or ends in a decree. I know of no rule by which the term judgment is limited to mean a *judgment which ends in a decree.*

"The learned vakil also argues that should his first contention be overruled, then article 5 of the 1st schedule and not article 4, is the proper article under which to levy the fee. In support of this contention he advances no argument and I think it is untenable.

"Lastly, he argues that as the review assails only part of the order, only a proportionate fee should be levied. He has omitted to show *what this proportion* should be, and as far as I can judge from reading the application for review it would be impossible to do so. *Another case in which a question similar to this has* arisen is at present before the Honourable Taxing Judge *for decision: therefore I direct this to be also laid before him.*"

On 23rd November 1908, the Taxing Officer made the following further reference:—

"I find I was under a misapprehension when I made my note as to the applicability of articles 4 and 5 of the 1st schedule.

1909

JAGAN NATH PRASAD v. MULCHAND

I would add that if the days spent in obtaining a copy be excluded the application for review was filed before the ninetieth day from the date of the judgment. But this does not assist the argument of the learned vakil as in *In re Kota* reported in I. L. R., 9 Mad., 134, and in *In the matter of Doorga Prosunno Ghose*, reported in 9 Calc., L. R., p. 479, the view taken is dead against his contention. I therefore think that the full fee is leviable."

Lala Girdhari Lal, for the appellant.

AIKMAN, J.—This is a reference by the Taxing Officer, under section 5 of the Court Fees Act. In Execution Second Appeal No. 1143 of 1907 a Bench of this Court referred certain issues for trial by the court below. An application was presented by the appellant in that case for a review of the interlocutory order referring these issues. The application was presented on a court-fee stamp of Rs. 2. The official charged with the duty of checking the court-fee reported that the application was insufficiently stamped on the ground that the proper court-fee on the application was the fee leviable on the memorandum of appeal. The Taxing Officer accepted this view, but considering the question to be one of general importance, made a reference regarding it under section 5. It is no doubt true that the application is an application for a review of judgment and that judgment is defined as meaning the statement given by the judge of the grounds of a decree or order. But in my opinion neither article 4 nor article 5 of schedule I of the Court Fees Act refers to an interlocutory order. I think it is clear from the language of these articles that they deal with judgments ending in a decree. I am of opinion therefore that the application was properly stamped. The learned vakil for the applicant has referred me to a case in the Bombay High Court in which a similar view was expressed by the learned Chief Justice on reference under section 5 of the Court Fees Act. This is to be found at p. 383 of the Printed judgments of the Bombay High Court for 1892. I concur with the view there taken. This is my answer to the reference.

Before Mr. Justice Aikman.

1909.
January 14.

BAJI LAL (APPELLANT) *v.* GOBARDHAN SINGH AND OTHERS (RESPONDENTS).*

Act No. VII of 1870 (Court Fees Act), section 5—Section 7, clause IX—Reference—Court fee—Foreclosure suit—Plaintiff ordered to discharge prior mortgage—Validity of mortgage challenged in appeal—Ad valorem fee.

In a suit for foreclosure a decree was passed in favour of the plaintiff conditionally on his redeeming a prior mortgage on payment of Rs. 5,914-6-5. The plaintiff appealed assailing the validity of the prior mortgage and stamped his memorandum of appeal with an *ad valorem* court fee on the amount of the principal sum of money secured by the prior mortgage. *Held* that the proper amount of court fee payable was an *ad valorem* court fee on the amount which the plaintiff had been ordered to pay to the prior mortgagee. *Nepal Rai* v *Debi Prasad* (1) and *Jhanda Mal* v. *Himmat* (2) followed.

THIS was a reference under section 5 of the Court Fees Act by the Taxing officer to the Taxing Judge. A memorandum of appeal having been presented for stamp report the Stamp Reporter made the following report :—

This is an appeal against the decree dated the 13th July 1908, passed upon a review of judgment on the application of Ganga Baksh Singh a respondent. The sole question in this appeal is as to whether the plaintiff appellant is liable to pay the amount found due under the deed, dated the 15th July 1892, namely, Rs 5,941-6-5. This being so according to the ruling in *Nepal Rai* v. *Debi Prasad* (1) this appeal should be valued at the last mentioned amount and a fee of Rs. 315 paid on the same. Rupees 61-8-0 having been paid, there is therefore a deficiency of Rs. 253-8 to be made good by the plaintiff-appellant on this memorandum of appeal. Relief prayed for is stated.

Munshi *Gulzari Lal*, for the appellant, took exception to the above report as below:

" In the above case the office report is to the effect that there is a deficiency of court fee to the extent of Rs. 253-8-0 due from the appellant on the memorandum of appeal filed in this Hon'ble Court. I beg to submit that the report overlooks the fact that the first two grounds of appeal question the validity of the mortgage which the appellant has been ordered to redeem and the sole question is not as to the amount to be paid for redemption. The

*Stamp Reference in review of judgment in first appeal No. 291 of 1901.

(1) Weekly Notes, 1905, p. 40. (2) Unreported judgment of Burkitt, J., dated 15th January 1903.

1909

JAGAN NATH PRASAD v. MULCHAND

I would add that if the days spent in obtaining a copy be excluded the application for review was filed before the ninetieth day from the date of the judgment. But this does not assist the argument of the learned vakil as in *In re Kota* reported in I. L. R., 9 Mad., 134, and in *In the matter of Doorga Prosunno Ghose*, reported in 9 Calc., L. R., p. 479, the view taken is dead against his contention. I therefore think that the full fee is leviable."

Lala Girdhari Lal, for the appellant.

AIKMAN, J.—This is a reference by the Taxing Officer, under section 5 of the Court Fees Act. In Execution Second Appeal No 1143 of 1907 a Bench of this Court referred certain issues for trial by the court below. An application was presented by the appellant in that case for a review of the interlocutory order referring these issues. The application was presented on a court-fee stamp of Rs. 2. The official charged with the duty of checking the court-fee reported that the application was insufficiently stamped on the ground that the proper court-fee on the application was the fee leviable on the memorandum of appeal. The Taxing Officer accepted this view, but considering the question to be one of general importance, made a reference regarding it under section 5. It is no doubt true that the application is an application for a review of judgment and that judgment is defined as meaning the statement given by the judge of the grounds of a decree or order. But in my opinion neither article 4 nor article 5 of schedule I of the Court Fees Act refers to an interlocutory order. I think it is clear from the language of these articles that they deal with judgments ending in a decree. I am of opinion therefore that the application was properly stamped. The learned vakil for the applicant has referred me to a case in the Bombay High Court in which a similar view was expressed by the learned Chief Justice on reference under section 5 of the Court Fees Act. This is to be found at p. 383 of the Printed judgments of the Bombay High Court for 1892. I concur with the view there taken. This is my answer to the reference.

Before Mr. Justice Aikman.

1909 January 26.

BAJI LAL (APPELLANT) v. GOBARDHAN SINGH AND OTHERS (RESPONDENTS)*

Act No. VII of 1870 (Court Fees Act), section 5—Section 7, clause IX—Reference—Court fee—Foreclosure suit—Plaintiff ordered to discharge prior mortgage—Validity of mortgage challenged in appeal—Ad valorem fee.

In a suit for foreclosure a decree was passed in favour of the plaintiff conditionally on his redeeming a prior mortgage on payment of Rs. 5,941-6-5. The plaintiff appealed assailing the validity of the prior mortgage and stamped the memorandum of appeal with an *ad valorem* court fee on the amount of the principal sum of money secured by the prior mortgage. *Held* that the proper amount of court fee payable was an *ad valorem* court fee on the amount which the plaintiff had been ordered to pay to the prior mortgagee. *Nepal Rai* v. *Debi Prasad* (1) and *Jhanda Mal* v. *Himmat* (2) followed.

THIS was a reference under section 5 of the Court Fees Act by the Taxing officer to the Taxing Judge. A memorandum of appeal having been presented for stamp report the Stamp Reporter made the following report :—

This is an appeal against the decree dated the 13th July 1903, passed upon a review of judgment on the application of Ganga Baksh Singh a respondent. The sole question in this appeal is as to whether the plaintiff appellant is liable to pay the amount found due under the deed, dated the 15th July 1892, namely, Rs. 5,941-6-5. This being so according to the ruling in *Nepal Rai* v. *Debi Prasad* (1) this appeal should be valued at the last mentioned amount and a fee of Rs. 315 paid on the same. Rupees 61-8-0 having been paid, there is therefore a deficiency of Rs. 253-8-0 to be made good by the plaintiff appellant on this memorandum of appeal. Relief prayed for is stated.

Munshi *Gulzari Lal*, for the appellant, took exception to the above report as below :

" In the above case the office report is to the effect that there is a deficiency of court fee to the extent of Rs. 253-8-0 due from the appellant on the memorandum of appeal filed in this Hon'ble Court. I beg to submit that the report overlooks the fact that the first two grounds of appeal question the validity of the mortgage which the appellant has been ordered to redeem and the sole question is not as to the amount to be paid for redemption. The

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*Stamp Reference in review of judgment in first appeal No. 291 of 1901.

(1) Weekly Notes, 1905, p. 40. (2) Unreported judgment of Banerji, J., dated 15th January 1903.

1909

JAGAN NATH PRASAD v. MULCHAND

I would add that if the days spent in obtaining a copy be excluded the application for review was filed before the ninetieth day from the date of the judgment. But this does not assist the argument of the learned vakil as in *In re Kota* reported in I. L. R., 9 Mad., 134, and in *In the matter of Doorga Prosunno Ghose*, reported in 9 Calc., L R, p. 479, the view taken is dead against his contention. I therefore think that the full fee is leviable."

Lala Girdhari Lal, for the appellant.

AIKMAN, J.—This is a reference by the Taxing Officer, under section 5 of the Court Fees Act. In Execution Second Appeal No 1143 of 1907 a Bench of this Court referred certain issues for trial by the court below. An application was presented by the appellant in that case for a review of the interlocutory order referring these issues. The application was presented on a court-fee stamp of Rs. 2. The official charged with the duty of checking the court-fee reported that the application was insufficiently stamped on the ground that the proper court-fee on the application was the fee leviable on the memorandum of appeal. The Taxing Officer accepted this view, but considering the question to be one of general importance, made a reference regarding it under section 5. It is no doubt true that the application is an application for a review of judgment and that judgment is defined as meaning the statement given by the judge of the grounds of a decree or order. But in my opinion neither article 4 nor article 5 of schedule I of the Court Fees Act refers to an interlocutory order. I think it is clear from the language of these articles that they deal with judgments ending in a decree. I am of opinion therefore that the application was properly stamped. The learned vakil for the applicant has referred me to a case in the Bombay High Court in which a similar view was expressed by the learned Chief Justice on reference under section 5 of the Court Fees Act. This is to be found at p. 333 of the Printed judgments of the Bombay High Court for 1892. I concur with the view there taken. This is my answer to the reference.

Before Mr. Justice Aikman.

1909. January 14.

BAJI LAL (APPELLANT) *v.* GOBARDHAN SINGH AND OTHERS (RESPONDENTS.)*

Act No. VII of 1870 (Court Fees Act), section 5—Section 7, clause IX—Reference—Court fee—Foreclosure suit—Plaintiff ordered to discharge prior mortgage—Validity of mortgage challenged in appeal—Ad valorem fee.

In a suit for foreclosure a decree was passed in favour of the plaintiff conditionally on his redeeming a prior mortgage on payment of Rs. 5,914-6-5. The plaintiff appealed assailing the validity of the prior mortgage and stamped his memorandum of appeal with an *ad valorem* court fee on the amount of the principal sum of money secured by the prior mortgage. *Held* that the proper amount of court fee payable was an *ad valorem* court fee on the amount which the plaintiff had been ordered to pay to the prior mortgagee. *Nepal Rai* v. *Debi Prasad* (1) and *Jhanda Mal* v. *Himmat* (2) followed

THIS was a reference under section 5 of the Court Fees Act by the Taxing officer to the Taxing Judge. A memorandum of appeal having been presented for stamp report the Stamp Reporter made the following report :—

This is an appeal against the decree dated the 13th July 1908, passed upon a review of judgment on the application of Ganga Baksh Singh a respondent. The sole question in this appeal is as to whether the plaintiff appellant is liable to pay the amount found due under the deed, dated the 15th July 1892, namely, Rs 5,941-6-5. This being so according to the ruling in *Nepal Rai* v. *Debi Prasad* (1) this appeal should be valued at the last mentioned amount and a fee of Rs. 315 paid on the same. Rupees 61-8-0 having been paid, there is therefore a deficiency of Rs. 253-8 to be made good by the plaintiff-appellant on this memorandum of appeal. Relief prayed for is stated.

Munshi *Gulzari Lal*, for the appellant, took exception to the above report as below:

" In the above case the office report is to the effect that there is a deficiency of court fee to the extent of Rs. 253-8-0 due from the appellant on the memorandum of appeal filed in this Hon'ble Court. I beg to submit that the report overlooks the fact that the first two grounds of appeal question the validity of the mortgage which the appellant has been ordered to redeem and the sole question is not as to the amount to be paid for redemption. The

*Stamp Reference in review of judgment in first appeal No. 291 of 1901.

(1) Weekly Notes, 1905, p. 40.

(2) Unreported judgment of Banerji, J., dated 15th January 1903.

1909

BAJI LAL v. GOBARDHAN SINGH.

ruling in Weekly Notes, 1905, page 40, has no application as the grounds raised in that case were only concerned with a portion of the sum payable for redemption and there was no question as to right of redemption. Here the appellant as puisne mortgagee questions both his liability to redeem as well as the amount he has to pay for redemption. The principle applicable is that applied to pre-emption cases and laid down in I. L. R., 6 All., 488, which by analogy would apply to redemption cases as well. Under section 7, clause ix, of the Court Fees Act, the principal amount secured by a mortgage is the sum on which court fee is to be calculated. Court fee can be calculated on the amount of the mortgage money payable for redemption only when there is no question as to the right or liability to redeem. Please see I. L. R., 13, All., 94; I. L. R., 27, All., 559."

The stamp reporter again put up the following report:—

"The learned vakil for the plaintiff appellant objects to the correctness of the office report. I beg to refer the case under section 5 of Act VII of 1870, for the decision of the Taxing Officer.

"The facts so far as they are material for the purposes of this reference are as follows:—

"The plaintiff Bajilal who is appellant here brought the suit which gave rise to this appeal in the Court of the Subordinate Judge of Cawnpore for foreclosure under a mortgage, dated the 10th November, 1894, executed by Gobardhan Singh in his favour in lieu of Rs. 1,300. He alleged further that at the time of the mortgage he had been given to understand that the property mortgaged to him was free from incumbrances; that he subsequently found that the mortgagor had executed a mortgage-deed in respect of some of the properties in dispute in favour of one Mora Singh for Rs. 138; that the latter sold it to Ganga Baksh Singh; that the mortgage-deed complained of was a fictitious transaction, and that no consideration passed for the same. The defendant Ganga Baksh Singh contested the suit on the ground that the mortgage held by him was real and that the plaintiff was bound to pay him Rs. 10,753-15-2 on that account. On the trial of the suit the court below found that the mortgage held by Ganga Baksh Singh was real. As to the amount

the parties stated that a sum of Rs. 2,357-1-6 was due thereunder. The court below passed a decree in plaintiff's favour for foreclosure of the property other than that covered by Ganga Baksh Singh's mortgage and as regards the latter it ordered that the plaintiff on paying Rs. 2,357-1-6 to Ganga Baksh Singh would be entitled to take by foreclosure the properties covered by both his and Ganga Baksh's mortgage. Later on, Ganga Bakhsh Singh applied to the court below under section 623, Civil Procedure Code, for review of judgment as regards the amount due under his mortgage and the court granting the review amended its judgment and awarded to Ganga Bakhsh Singh Rs. 5, 941-6-5 instead of Rs. 2,357-1-6. The plaintiff now appeals to this Honourable Court as regards the mortgage, dated the 15th July, 1892, held by Ganga Baksh Singh. Having regard to the grounds taken in this Court it seems to me that the sole object of the plaintiff is to get a decree for foreclosure of the entire property mortgaged to him free from the liability imposed by the decree appealed against on paying the mortgage money due on Ganga Baksh Singh's mortgage.

"The case in *Bhawani Prasad* v. *Kutub-un-nisa Bibi* (1), cited by the appellant has absolutely no bearing on the present case. That was a case as to future interest the amount whereof was not known at the time the appeal was filed and their Lordships held that a fee of Rs. 10 was sufficient under article 17, clause vi. The cases of *Hafiz Ahmad v. Sobha Ram* (2) and *Pirbhu Narain Singh v. Sita Ram* (3) do not also apply, the former was a pre-emption case and the latter has been dissented from by the Allahabad and Madras Courts. The objection of the plaintiff appellant might have some force, had the question at issue in the appeal related to the validity or otherwise of the mortgage sued upon. But that is not the case here. The prior mortgagee says "my mortgage is real, let me have my money and you may foreclose the property mortgaged to me as well." The Court allows this plea and directs the plaintiff to pay up the amount due on the prior mortgage and he gets a decree for foreclosure on his mortgage. I submit that the law laid down in *Nepal Rai* v. *Deb*

(1) [1905] I. L. R., 27 All., 559. (2) [1884] I. L. R., 6 All. 488.
(3) [1890] I. L. R., 13 All., 94.

1909

BAJI LAL v. GOBARDHAN SINGH.

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There have been several decisions on questions similar to the present one, but, in the present case the question presents itself in a somewhat different form. It is clearly settled by the decision in *Nepal Rai* v. *Debi Prasad and others* (1) that where the question in appeal merely refers to the amount which a mortgagee in a suit for foreclosure has to pay before he can be permitted to foreclose, the appeal must be stamped *ad valorem* with reference to this amount. On the other hand, if the appeal only raises the question of the validity of the mortgage and does not go on to contest the correctness of the sum found to be due under the impugned mortgage by the lower court in case the High Court held the mortgage to be valid, *i. e.*, if the appellant has only one string instead of two to his bow, it would appear from the reasoning in *Pirbhu Narain* v. *Sita Ram* (2) that the stamp should be calculated on the principal money covered by the mortgage. Thirdly if the appellant both impugns the mortgage and is prepared, if he is defeated on that point, also to contest the correctness of the amount ordered to be paid, the question arises, whether he is to pay court fees calculated on the amount decreed by the lower court or on the amount secured by the mortgage. As far as I am aware there is no decision directly dealing with the question. In *Hafiz Ahmad* v. *Sobha Ram* (3) it was held that "where an appeal is preferred in a suit for pre-emption on the ground that the right to pre-empt has or has not been established as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as in terms provided in article vi of section 7 of the Act. But when the question in appeal relates solely to the amount to be paid by the pre-emptor, then we think it should be calculated *ad valorem* etc." If the analogy of this decision be applied to the present case, it would appear that the court fee should be calculated as laid down in section 7, article ix, of the Act. But I would point out that the result of that would be that an appellant by inserting in his memorandum of appeal a ground as to the validity of the mortgage, which possibly he might seriously intend to press, would get his appeal on a

(1) Weekly Notes, 1905, p 40. (2) (1890) I. L. R., 13 All., 94.
(3) (1884) I. L. R., 6 All., 488.

1909

Baji Lal v. Gobardhan Singh.

lower court fee than he would had he confined himself to impugning the correctness of the amount found due under the mortgage. There is, however, yet another consideration which, if I correctly understand the law laid down, affect all three cases put above and that is whether the provisions of section 7, article ix, can be applied to appeals at all. With regard to this I would refer to third paragraph of the ruling in the case of *Nepal Rai* v. *Debi Prasad* (1). The language of this paragraph, especially the words "This section is confined to a suit apparently, and not to any appeal" seem to me to exclude all appeals from the scope of the section, and the words immediately following those quoted appear to lay down that the provisions of the first schedule apply in all cases, or at any rate in all cases of the nature now under consideration. Therefore even an appeal in which the validity of the mortgage was the sole ground, would have to be stamped on the sum found *ad valorem* due under the mortgage and *a fortiori* an appeal such as the present one in which the amount due is also in question. As the point is an important one, I have the honour to refer it for decision. I would add that I am not quite clear how far the appellant is prepared to contest the correctness of the sum found due by the lower court. But from the 5th and 6th grounds of the memorandum it may be gathered that he will only ask that this sum be reduced from Rs. 5,941-6-5 to Rs. 2,357-1-6. In that case the *ad valorem* fee would be calculated on the difference between these two sums.

The following order was passed by

AIKMAN, J.—The appellant Baji Lal sued to foreclose a mortgage. As a condition precedent to foreclosure, the court below held that the appellant was bound to redeem a prior mortgage by payment of a sum of Rs. 5,941-6-5. Baji Lal has appealed against this portion of the decree and the office reported that the memorandum of appeal should bear an *ad valorem* fee on this amount. The Taxing Officer took the same view, but has referred the case under section 5. It is not easy to reconcile all the decisions cited but in my opinion the later decisions support the view taken by the office. That view is in accord with the *ratio decidendi* in *Nepal Rai* v. *Debi Prasad* (1).

(1) Weekly Notes, 1905, p. 40.

1908

BAJI LAL v. GOBARDHAN SINGH.

In a reference under section 5 in *Jhandu Mal* v. *Himmat*, second appeal of 1907, from the decree of the Additional Judge of Meerut, the learned Judge who disposed of the reference said :—The appellant plaintiff seeks by this appeal to get rid of a liability imposed on him by the decree under appeal to pay off Kalyan's prior mortgage as a condition precedent to bringing the mortgaged property to sale" and he held that the appellant must pay an *ad valorem* court-fee. I am unable to distinguish the principle therein laid down from that involved in the present case. My answer to the reference is that the office report is correct.

I allow the appellant one month within which to pay the deficient court-fee.

APPELLATE CIVIL.

1909
January 14.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

GHULAM HUSAIN AND ANOTHER (DEFENDANTS) v. MUHAMMAD HUSAIN (PLAINTIFF) AND MUHAMMAD WALI AND OTHERS (DEFENDANTS.)*

Act No. I of 1877 *(Specific Relief Act), section* 42—*Suit for possession before expiry of lease—Declaratory decree—No alteration in the nature of the suit.*

During the subsistence of a tenancy a third party dispossessed the plaintiff's tenants. The plaintiff sued the third party for possession. *Held* that the suit for immediate possession was not maintainable in consequence of the existence of the outstanding lease. *Held* that the plaintiff in such a case was entitled to a declaration of title and this does not alter the nature of the suit. *Sita Ram* v. *Ram Lal* (1) followed

THE facts of this case are as follows :—

The plaintiff's tenants were dispossessed by defendant No. 1 and four others from a house. Thereupon the plaintiff instituted this suit for possession of the house. The defendants contended that as the house had been let out on a lease for a year which had not expired, the plaintiff was not entitled to immediate possession. The Court of first instance (Munsif of East Budaun) dismissed the suit sustaining the defendants' plea. On appeal (District Judge of Shahjahanpur) the Munsif's judgment was reversed. The defendant appealed to the High Court.

Dr. *Tej Bahadur Sapru* (for whom Munshi *Iswar Saran*) for the appellants, contended that the plaintiff could not succeed in

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* First Appeal No. 103 of 1908 from an order of C. W. Steel, District Judge of Shahjahanpur, dated the 9th of July 1908.

(1) (1896) I. L. R., 18 All., 440

1909

GHULAM HUSAIN v. MUHAMMAD HUSAIN.

a suit for possession as he was not entitled to immediate possession at the time he brought the suit. The lease had not expired at the time when the suit was instituted. He cited *Gulzar Singh* v. *Kalyan Chand* (1), *Davis* v. *Kazee Abdool Hamed* (2), *Ramanadan Chetti* v. *Pulikutti Servai* (3), *Sita Ram* v. *Ram Lal* (4), *Jagannatha Charry* v. *Rama Rayer* (5).

Mr. *Abdool Raoof*, for the respondents, submitted that the plaintiff was entitled to maintain the suit. The ruling in *Gulzar Singh* v. *Kalyan Chand*, was not an authority on the point. Even if the plaintiff was not entitled to obtain possession, he had surely a right to a declaration of title under section 42 of the Specific Relief Act to protect his interest. He cited *Salima Bibi* v. *Sheikh Muhammad* (6), *Ramanadan* v. *Pulikutti Servai*, (3).

Munshi *Iswar Saran*, in reply submitted that if a declaratory decree be granted, it would change the nature of the suit.

KNOX and GRIFFIN, JJ.—The subject-matter in dispute in this appeal is a house situated in Budaun. The plaintiff sued for possession but in his plaint added a further prayer that any other relief to which he might be entitled be granted to him. One of the defences and the only one with which we are now concerned, was that as the plaintiff's mother acting for him had granted a lease to certain third persons, the plaintiff could not sue for immediate possession inasmuch as the lease was a lease for one year and this period had not determined at the time when the suit was brought. The Court of first instance sustained this plea but in appeal the District Judge held that the plaintiff was entitled to claim immediate possession. He accordingly reversed the order of the Munsif and remanded the case for determination on the merits under section 562 of the former Code of Civil Procedure. The defendants who were in actual possession have come to this Court and again raise the plea that upon the plaintiff's own showing his suit for immediate possession can not succeed as the term of the lease had not expired at the date of suit.

(1) (1893) I. L. R., 15 All., 339.
(2) (1867) 8. W. R., 55.
(3) (1898) I. L. R., 21 Mad., 288.
(4) (1896) I. L. R., 18 All., 440.
(5) (1904) I. L. R., 28 Mad., 233.
(6) (1895) I. L. R., 18 All., 131.

1909

GHULAM HUSAIN v. MUHAMMAD HUSAIN.

The learned vakil for the appellants relied upon *C. T. Davis* v. *Kazee Abdool Hamed* (1), *Ramanadan Chetti* v. *Pulliskutti Servai* (2). We think that this prayer is so far entitled to prevail that the plaintiff's suit at the time he brought it, so far as it related to immediate possession, was not maintainable in consequence of the existence at the time of the outstanding lease in favour of Nazir Khan and Amin Khan. It is true that in the case of *Ramanadan Chetti* v. *Pullikutti Servai* (2) the Court refused to grant a declaration in plaintiff's favour, but that was in consequence of the special circumstances of that case. This Court in the case of *Sita Ram* v. *Ram Lal* (3) while upholding a plea that the plaintiff was not entitled to possession, so long as there was a tenant entitled to possession held further that the landlord in such a case had a right to a declaration under section 42 of the Specific Relief Act. The learned vakil for the appellants contends that even this relief could not be given inasmuch as it would alter the nature of the suit. We do not agree with this. We allow the appeal so far as to amend the order of the District Judge into an order under Order XLI, Rule 23 of the present Code of Civil Procedure. Under that Rule we direct the case be remanded, that issues Nos. 1 and 2, as fixed in court of first instance, be tried in the case now remanded and that the court proceed to determine the suit; the evidence recorded during the original trial shall, subject to all just exceptions, be evidence in the case after remand. If the Court find these issues in the plaintiff's favour he should be granted a declaratory decree under section 42 of the Specific Relief Act. The costs of this appeal will follow the event.

Appeal decreed and cause remanded.

(1) (1867) 8 W. R., 55. (2) (1898) I. L. R., 21 Mad., 288.
(3) (1896) I. L. R., 18 All., 440.

1909
January 16.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji,
DARIA (DEFENDANT) *v.* HARKHIAL AND ANOTHER (PLAINTIFFS)*

Pre-emption—Village divided into several mahals—Rights of pre-emption given to co-sharers in the village—Right among co-sharers of thoks.

The *wajib-ul-arz* of a village gave a right of pre-emption to share-holders in a *patti*, then to those in a *mahal* and lastly, to those in the village. The village was divided into several *thoks*. One of the *thoks, viz.* Jaroli was subsequently sub-divided into several *mahals* and under the new arrangement the *thoks* were done away with. A share was sold in the *thok* so sub-divided and was purchased by a co-sharer in one of the old *thoks*. A co-sharer in one of the *mahals* of *thok* Jaroli sued for pre-emption. *Held* that the vendee being a co-sharer in the village the plaintiff had no preferential right of pre-emption inasmuch as the old *pattis* and *thoks* had been done away with. *Dalganjan Singh* v. *Kalka Singh* (1), distinguished.

THE facts of this case are as follows:—

Mauza Basawar consisted of several *thoks*, one of which was *thok* Jaroli. *Thok* Jaroli had several *pattis*. The plaintiff, the vendor, and the vendee were all co-sharers in *thok* Jaroli, but not in the same *patti*. The *wajib-ul-arz* of village as it stood in 1283 fasli, contained the following provisions as to preemption :—

"*Dawa haq shaffa ka dar surat intiqal haqiat kisi hissedar ke bazarie bai wa rehn : awal Bhai Bhatija haqiqi aur doem phir Bhai Bhatija chachazad shurkayan haqiat aur seom phir hissedar patti aur chaharam phir hissedar thok aur panchwen phir malikan deh ka hoga; aur jo malikan deh se koi na lewe to usko akhtiar hoga jiske hath chahey rehn wa bai kari.*"

In 1305 *thok* Jaroli was perfectly partitioned into several *mahals*, one of which was *mahal Harkhial* and *Dalipa*. By this new arrangement the pre-empted property and the property of the plaintiff fell in *mahal Harkhial* and *Dalipa* and that of the vendee in another *mahal*, known as *mahal Chandarsen*. The new system did away with the *pattis*. No new *wajib-ul-arz* was prepared after the partition. The plaintiff brought this suit of pre-emption on the plea that he was a co-sharer with the vendor in the same mahal, whereas the vendee was a stranger to it. The defence was that the plaintiff had no preferential right to pre-empt. Both the lower courts

* [illegible]al No. 64 of 1908, under section 10 of the Letters Patent.

(1) (1899) I. L. R. 22, All., 1.

allowed this contention relying on *Gobind Ram* v. *Masih-ul-lah Khan* (1) and dismissed the plaintiff's suit. On appeal to the High Court, GRIFFIN, J., reversed the decree of the courts below holding that the principle enunciated in *Dalganjan Singh* and *Kalka Singh* (2) applied to the present case.

The defendant appealed.

Babu *Jogindra Nath Mukerji*, for the appellant.

Babu *Benode Behari*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for pre-emption. The village in question formerly consisted of several *thoks*, one of which was *thok* Jaroli. *Thok* Jaroli consisted of several *pattis*. The property in dispute was situate in *patti* Khera of *thok* Jaroli. In this *thok* the plaintiff was a co-sharer. The *wajib-ul-arz* of the village gave a right of pre-emption to five classes of pre emptors. With the first two classes we are not concerned. The third class consists of share-holders in a *patti*, the fourth, sharers in a *thok*, and the fifth share-holders in the village. In the year 1305 Fasli *thok* Jaroli was by perfect partition divided into several *mahals* one of which is *mahal* Harkhial and Dalipa. By the new arrangement the property sought to be pre-empted and the property of the plaintiff fell in *mahal* Harkhial and Dalipa. The defendant appellant is not a co-sharer in *mahal* Harkhial and Dalipa but is the owner of *mahal* Chanderseu, one of the *mahals* of the old *thok* Jaroli. It thus appears that by the new arrangement *pattis* and *thoks* have been done away with and the old *thok* Jaroli has been divided into several new *mahals*. Both the lower Courts held that in view of the new arrangement the plaintiff had no preferential right of pre-emption over the defendant appellant. On appeal the learned Judge of this Court, before whom the appeal was heard, came to the conclusion that the case was governed by the ruling in the case of *Dalganjan* v. *Kalka Singh* (2). We are unable to agree in the view taken by the learned Judge. It appears to us that when the *pattis* and *thoks* into which the village was divided were done away with, the plaintiff could only claim pre emption by virtue of his being a shareholder in the village. The defendant vendee is also a share-holder in the

(1) (1899) I. L. R., 22 All., 1. (2) (1907) I. L. R., 29 All., 235

1909

DARIA v. HARKHIAL.

village and the plaintiff has no preferential right over the defendant. If there had been a new *wajib-ul-arz* provision might have been made whereby preference would under the circumstances be given to the plaintiff, but in this case no new *wajib-ul-arz* was prepared. Therefore the rights of the parties are governed by the old *wajib-ul-arz* and in view of the fact that the old *pattis* and *thoks* have been done away with, we fail to see how the plaintiff has any preferential right of pre-emption over the defendant vendee. For these reasons we allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court. We give the defendant appellant the costs of this appeal.

Appeal decreed.

1909
January 20.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SHEO KARAN SINGH AND ANOTHER (DEFENDANTS), v. MAHARAJA PARBHU NARAIN SINGH (PLAINTIFF.)*

Landlord and tenant—Possession without a lease—Kabuliat—Suit for rent—Liability for compensation for use and occupation—Denial of liability—Estoppel.

When certain persons entered into possession of property executing a registered *kabuliat* and paid rent for sometime but in a suit for rent pleaded that in the absence of a lease there was no contract of tenancy and rent could not be recovered by suit, *held* that the suit might be treated as one for use and occupation and in view of the fact that the defendants entered into, and continued in possession they could not be heard to say that they were not liable for use and occupation.

THIS was a suit for arrears of rent on the basis of a registered *kabuliat* executed by the defendants. By the *kabuliat*, an annual rent of Rs. 4,701 was reserved for the landlord and the term of the lease was nine years. The defendants were let into possession of the property. No lease was executed by the plaintiff. In the written statement which the defendants filed they admitted that rent had been paid for some time, but they raised the question that a mere *kabuliat* without a lease did not constitute a contract. The court below decreed the suit. The defendants appealed to the High Court.

* First Appeal No. 5 of 1903 from a decree of Shah Wahid Alam, Assistant Collector 1st class of Benares, dated the 30th September 1905.

Babu *Lalit Mohan Banerji* (for whom Babu *Surendra Nath Sen*) for the appellant, contended that a *kabuliat* was the counterpart of a lease and since there was no lease in the present case there could be no counterpart. A *kabuliat* showed only a unilateral intention to be bound by the terms of a contract embodied in a lease. It was merely the agreement of a tenant to accept the tenancy and not the agreement of a landlord to lease the land. He relied on *Nand Lal* v. *Hanuman Das* (1), *Kashi Gir* v. *Jogendro Nath Ghose* (2), *Beni* v. *Puran* (3), *Sikandar* v. *Bahadur* (4), *Turof Sahib* v. *Esuf Sahib* (5).

In a suit for rent where an alternative relief for compensation had not been claimed no damages for use could be awarded. *Rachhea Singh* v. *Upendra Chandra Singh* (6). A valid transfer could only be created by a registered instrument—in this case a lease—and where a document ought to be in writing and registered, oral evidence was not admissible. *Somu Gurukhal* v. *Rangammal* (7).

The Hon'ble Pandit *Sundar Lal* (with whom Munshi *Gokul Prasad*), for the respondents, submitted that the execution of a lease was not the only way of creating a tenancy. A tenancy was created as soon as rent was paid and it was admitted in this case that rents had been paid for some time. Where there was an obligation, evidenced by a registered document, in return for use of land, it could be enforced. The tenancy was created by payment of rent and the document was an evidence of the terms of the tenancy.

STANLEY, C.J., BANERJI AND AIKMAN, JJ.—In the suit out of which this appeal has arisen His Highness the Maharaja of Benares sued for arrears of rent, relying on a *kabuliat*, dated the 7th of December 1899, executed by the defendants and registered on the 8th of December 1899. By the *kabuliat* the rent reserved for the holding was an annual sum of Rs. 1,701 and the term of the lease was nine years. The defendants were let into possession of the property on the faith of the *kabuliat*. No lease was executed by the plaintiff. In the plaint the plaintiff sets

(1) (1904) I. L. R., 26 All., 338.
(2) (1904) I. L. R., 27 All., 13.
(3) (1904) I. L. R., 27 All., 130.
(4) (1905) 2 A. L. J. R., 302.
(5) (1907) I. L. R., 30 Mad., 322.
(6) (1900) I. L. R., 27 Calc., 523.
(7) (1871) 7 M. H. C. R., 13.

1903

SHEO KARAN SINGH v. MAHARAJA PARBHU NARAIN SINGH.

out the terms of the *kabuliat* and says that in accordance with the agreement entered into thereunder the sum which he claimed was due. The defendants in their written statement did not deny that a tenancy subsisted between them and the plaintiff, but they raised various objections to portions of the claim. In a supplementary written statement, however, they pleaded this defence, namely that "a mere *kabuliat* without there being a lease is not sufficient to constitute a contract. Hence the suit, merely on the basis of the *kabuliat*, is improper and not correct." We are not clear as to the meaning of this difference but we take it from the argument which has been addressed to us that the defendants contend that by reason of the fact that a *patta* or lease was not executed by the plaintiff, he cannot recover any rent in respect of the use and occupation of his land by the defendants. The Court below held that the defendants executed the *kabuliat* in favour of the plaintiff and had it registered and that they came in possession under it and that consequently the execution of the lease was not necessary in order to entitle the plaintiff to maintain the suit. We think that the claim of the plaintiff may be treated as one for compensation for the use and occupation of the land and in view of the fact that the defendants entered into and have continued in occupation of the land, with the plaintiff's consent, they undertaking to pay rent therefor, they cannot be heard now to say that they are not liable for rent for use and occupation. They certainly cannot be treated as trespassers and it is admitted that they heretofore have paid rent to the plaintiff in respect of their occupation of the land in question. It is not their case that they are trespassers Under these circumstances we fail to discover on what ground they can resist the plaintiff's claim to recover compensation for the use and occupation of his land.

Then the question arises as to the measure of compensation. We have the means of determining that by reference to the *kabuliat* which was executed by the defendants in favour of the plaintiff. They agreed to pay the rent claimed. This rent the Court below has allowed, we think rightly.

The only ground of appeal which has been pressed in argument before us is the first, namely that a *kabuliat* without a

1909

SHEO KARAN SINGH v. MAHARAJA PARBHU NARAIN SINGH

patta does not create a valid lease of immoveable property. As to this we express no opinion inasmuch as we find that under the circumstances the plaintiff is clearly entitled to recover compensation for use and occupation.

In view of the fact that the defendants have been in occupation of the land with the consent of the plaintiff, and of the fact that the rent was fixed by the *kabuliat* which has been given in evidence, we think there is no force in the first ground of appeal. The learned vakil for the appellants has abandoned the the second, third and fourth grounds of appeal. We therefore dismiss the appeal but we think that having regard to the fact that the plaintiff has neglected to take the precaution of executing, in favour of his lessees, a proper lease, he is not entitled to any consideration in the matter of costs. We therefore allow no costs to either party.

We express no opinion as to the correctness of the rulings which were relied upon by the learned vakil for the appellants, namely in the cases of *Nand Lal* v. *Hanuman Das* (1), *Kashir Gir* v. *Jogendro Nath Ghose* (2), *Beni* v. *Puran Dass* (3), and *Turof Sahib* v. *Esuf Sahib* (4).

Appeal dismissed.

APPELLATE CIVIL.

1909. *January 22.*

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

CHHAKAURI KHAN (PLAINTIFF) *v.* PIR BAKHSH KHAN AND ANOTHER, (DEFENDANTS).*

Act (Local) No. III of 1901 *(Land Revenue Act), sections* 30, 210, 211—*Act (Local) No. II of* 1901 *(Agra Tenancy Act), section* 159—*Code of Civil Procedure (Act XIV of* 1882) *section* 310A—*Appeal—Jurisdiction.*

Two decrees were obtained in the Revenue Court, one was for costs resulting in proceedings under section 30 of the Land Revenue Act, and the other was passed under section 159 of the Agra Tenancy Act. The decrees were consolidated and one sale was held on account of both of them. The judgment-debtor applied to the Assistant Collector, offering to pay in the sum decreed under section 310A of the Code of Civil Procedure, 1882. The application was rejected by the Assistant Collector, and the auction-purchaser obtained formal possession over the

* First Appeal No. 110 of 1907 from an order of Sarah Chandra Bose, District Judge of Ghazipur, dated the 5th of September 1907.

(1) (1901) I. L. R., 23 All., 333.
(2) (1901) I. L. R., 27 All., 133.
(3) (1904) I. L. R., 27 All., 150.
(4) (1907) I. L. R., 30 Mad., 322.

1909

CHHATARI KHAN v. PIR BAKHSH KHAN.

undoubtedly had the power of revision. The appellant did apply to the Board and got from the Board of Revenue the order of which he complains. With that order the Civil Court is forbidden to interfere under section 167 of Act No II of 1901.

This is certainly a matter in which the Board of Revenue could take cognizance of the disputes between the parties and no Court other than the Court of Revenue could take cognizance. The appeal fails and is dismissed with costs.

Appeal dismissed.

1909 January 23.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Karamat Husain.

HARI SINGH AND OTHERS (PLAINTIFFS) *v.* SHER SINGH AND ANOTHER (DEFENDANTS.)*

Code of Civil Procedure (Act No XIV of 1882), section 317—when applicable—Purchase made by a member of joint Hindu family—Plea that purchase was made on behalf of family.

When property is purchased at a Court sale in the name of one of the members of a Hindu family which is alleged to be a joint family and it is alleged that the purchase was made on behalf of the family, *held* that section 317 of the Code of Civil Procedure 1882, has no application to such a case. The object of section 317 is to check *benami* purchases.

THE facts of this case are fully set out in the judgment of their lordships.

The Hon'ble Pandit *Sunder Lal* and Pandit *Moti Lal Nehru* for appellants.

Dr. *Tej Bahadur Sapru*, Munshi *Gokul Prasad* and Babu *Surendra Nath Sen* for respondents.

STANLEY, C.J., and KARAMAT HUSAIN, J.—The suit out of which this appeal has arisen was brought by the plaintiffs appellants for possession of a house. The plaintiffs impleaded in the suit two brothers namely Sher Singh and Partab Singh, claiming title to the house under a sale-deed executed on the 28th of April 1896, by Sher Singh alone purporting to act on behalf of himself and Partab Singh. Partab Singh filed a defence to the offect that he alone was the owner of the house under a purchase made by him and that he did not authorise his brother Sher Singh to execute the sale deed in favour of the plaintiffs on his behalf. The suit was

* [illegible] Additional [illegible] of Mutt[illegible] [illegible] Judge of Moradabad, dated the [illegible] 1907.

dismissed in the Court of first instance, whereupon an appeal was filed but during the pendency of the appeal Partab Singh died childless, leaving a widow, namely the defendant respondent Musammat Misri. Musammat Misri was not brought upon the record within the period of six months allowed by law for that purpose and after the expiration of this period she applied to the learned Additional Judge, before whom the appeal was pending for an order declaring that the appeal had abated. This application was made on the 15th of August 1901. The answer to her application was that Sher Singh and Partab Singh formed a joint family and there was no necessity, in view of this fact, to bring Musammat Misri on the record, inasmuch as any interest which Partab Singh had, survived to his brother Sher Singh. Upon this application an order was passed on the 30th of September 1901, the particulars of which it is unnecessary at length to state. Suffice it to say the Court remanded the case to the Court of first instance with directions to that Court to take fresh evidence under sections 569 and 570 of the Code of Civil Procedure, Act XIV of 1882. Before this order was complied with the plaintiffs and Sher Singh agreed to refer their disputes to arbitration and these disputes were accordingly so referred and an award has been passed. Musammat Misri, the widow of Partab Singh was no party to this reference and is therefore clearly not bound by it. An award was made according to which the plaintiffs' claim for recovery of the house in dispute was allowed. Musammat Misri then came forward and applied that the award should be declared not to be binding upon her and that the suit should be disposed of. The award was then set aside on the 11th of December 1905. The case then came up for hearing on the 6th of February 1905, when Sher Singh without consulting Musammat Misri, refused to put in any evidence and ultimately the appeal was dismissed for want of prosecution. Then on appeal to the High Court the appeal was restored and directed to be heard on its merits and accordingly came before the learned Additional Judge from whose decision this appeal has been preferred.

Upon the important question in the case as to whether the house in dispute was owned by Partab Singh alone or by him and

1909

HARI SINGH v. SHER SINGH.

Sher Singh jointly, the learned Judge came to the conclusion that it was unnecessry to determine this question in view of the provisions of section 317 of the Code of Civil Procedure. In his judgment he says:—"It appears that as long ago as the year 1879 the property in question was sold in execution of a judgment-debt against the father of Partab Singh and Sher Singh and was bought in by Sheo Dayal in the name of Partab Singh, this Sheo Dayal Singh being the father-in-law of Partab Singh. Now under section 317, Civil Procedure Code, it was not open to Partab Singh's own father to question his title, nor did he or any one else ever do so, and I think it is useless for the present plaintiffs, therefore, to try and argue that the property was really joint family property." In this the learned Additional Judge was clearly in error. Section 317 of the Code has no application to a case of the kind. The object of that section was to check *benami* purchases. In this case the purchase was made by one member of a Hindu family which is alleged to have been a joint family, and the question which the Court ought to have decided was whether or not that purchase was made by Partab Singh as member of a joint Hindu family for himself or for himself and Sher Singh, the other member of the family. We cannot therefore decide this appeal without referring an issue to the lower appellate Court for determination and that issue is whether the house in dispute was purchased by Partab Singh for himself alone or for himself and for Sher Singh as members of a joint Hindu family. If it was purchased by him for himself and his brother, and the property was therefore joint family property, Musammat Misri was not a necessary party to the suit. We therefore refer this issue to the lower appellate Court under order 41, rule 25 of Act No. V of 1908 and we direct the Court to take such relevant evidence as the parties may adduce. On return of its finding we allow the parties the usual ten days for filing objection.

Cause remanded.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

1903
January

GOPI NATH SINGH (DECREE-HOLDER) *v.* HARDEO SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Act No. IX of 1908, (Limitation Act), section 20—Appropriation by creditor of payment towards interest—Interest not paid as such—Money paid found by Court to be paid as interest.

Under the terms of a mortgage bond executed in 1884 any payments made thereunder was to be applied first in payment of interest and next in payment of principal. The debtor paid several sums from time to time from 1887 to 1890. A suit for sale was instituted in 1902 and decreed. The mortgaged property being insufficient to discharge the mortgage an application was filed by the decree-holder for a decree under section 90 of the Transfer of Property Act. *Held* that having regard to the terms of the bond and the finding of the court that payments were appropriated on account of interest, it might be rightly inferred that payments were made on account of interest as such and that the application for a decree under section 90, Act No. IV of 1882 was not barred by limitation. *Hanmant mal v. Rambabai* (1), *Narrunji v. Mugniram* (2), and *Surju Prasad v. Khwahish Ali* (3) distinguished.

THE facts of this case are that on August 28, 1902, Gopinath Singh, the appellant, instituted against the respondents a suit for sale on foot of a mortgage executed by the father of the defendants on March 21, 1884. The deed provided that any payment made under it was first to be applied to the payment of compound interest, next to payment of simple interest, and lastly to the payment of principal. Payments were made from time to time and except one payment in the year 1887 no payment was marked as being made on account of interest. The mortgagee, however, claimed to have appropriated them towards payment of interest. The mortgagee obtained a decree for sale and sold the mortgaged premises. The sale proceeds being insufficient to satisfy his claim he applied for a decree under section 90 of Act No. IV, 1882. The defendants objected to the application on the ground that the plaintiff's suit not having been instituted within six years from the execution of the deed was time barred. The Subordinate Judge of Meerut disallowed the application holding that the payments were not made towards interest and appropriation of payment by creditor could not give fresh

* First Appeal No. 51 of 1903 from a decree of H. David, Subordinate Judge of Meerut, dated the 1st June 1907.

(1) (1879) I. L. R., 3 Bom., 198. (2) (1880) I. L. R., 6 Bom., 103
(3) (1882) I. L. R., 4 All., 512.

1909

GOPI NATH SINGH v. HARDEO SINGH.

starting point for limitation under section 20 of the Indian Limitation Act. The decree-holder appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant, contended that a creditor had, in the absence of any direction of the debtor to the contrary, a discretion to appropriate any payment towards interest under section 60 of the Contract Act. Such appropriation was sufficient for the purposes of section 20 of Act IX of 1908, to save limitation. Section 20 of Act IX of 1908 was not inconsistent with section 60 of Act IX of 1872; that both the sections read together established the proposition that an appropriation by a creditor of any payment towards interest could save time. He relied on *Nirpat* v. *Shadi* (1).

The Hon'ble Pandit *Sundar Lal*, for the respondent, submitted that an indication of the will of the debtor that the payment was made towards interest was essential for the purposes of the Limitation Act to extend time. The Contract Act provided for the exercise of discretion by both the payer and the payee as to appropriation of payments, but the Limitation Act section 20, confined itself strictly to the discretion of the payer. To extend time under section 20 of the Limitation Act it was necessary that the debtor should intimate that he was making the payment toward interest as such. He cited *Damodar Ramchander Bapat* v. *Bai Jankibai* (2), *Hanmantmal Motichand* v. *Rambabai* (3), *Narrunji Bhimji and others* v. *Mugniram Chandaji* (4), *Surju Prasad Singh* v. *Khwahish Ali* (5), *Subraya Kamati* v. *Pakaya bin Narayan* (6).

Dr. *Tej Bahadur Sapru*, in reply. For the purposes of section 20 of the Limitation Act intimation of intension on the part of the debtor as to the payment of interest as such was not necessary. He relied on a passage at page 748 of Mittra's Law of Limitation and Prescription. He further submitted that the Contract Act was an earlier Act, while the Limitation Act was a later one. If the Legislature had meant anything to contradict the earlier Act there would have been an express provision as to that in the later.

(1) Weekly Notes, 1881, p. 19.
(2) (1903) 5 Bom., L. R., 350.
(3) (1879) I. L. R., 3 Bom., 198.
(4) (1880) I. L. R., 6 Bom., 103.
(5) (1881) I. L. R., 4 All., 512.
(6) (1902) 4 Bom., L. R., 231.

KNOX and GRIFFIN, JJ.—This first appeal arises out of an application made by one Chaudhari Gopinath, decree-holder. The application is under section 90 of the Transfer of Property Act asking for a decree under that section and for sale of certain property of Dalip Singh and others, judgment-debtors.

Among other objections raised by the judgment-debtors was an objection to the effect that the claim to this decree was barred inasmuch as the suit was filed when more than six years had expired after the execution of the bond. The bond was dated 21st of March 1884, the suit brought upon it was instituted on the 28th of August 1902. Several payments had been made from time to time, but the judgment-debtors objected that these payments were not payments made towards interest "as such." The Subordinate Judge who tried the suit held that these payments should be considered payments appropriated by the judgment-creditor towards interest due under the bond. The lower Court in considering the application for execution was of opinion that (1) mere appropriation by the creditor of any amount paid towards interest, or (2) any direction of a Court that sums paid be appropriated under the provisions of the Contract Act, sections 59, 60 and 61, towards interest could not be interpreted as payments made by the debtor towards interest "as such" and (3) that the suit brought by Chaudhri Gopinath having been filed when more than six years had expired from the execution of the bond, held that the present application for a decree under section 90 of the Transfer of Property Act could not be granted and dismissed the decree-holder's application. The decree-holder comes here in appeal and contends that under the circumstances of the case the payments made by the judgment-debtor must be held to be payments coming within section 20 of the Limitation Act, namely, payments of interest on debt paid "as such" before the expiration of the prescribed period by the person liable to pay the debt.

The bond in suit was, as already stated, executed on the 21st March 1884, and there has been a series of payments made under it nearly every year from the year 1887 up to the year 1899. With the exception of the very first payment, namely, that on the 26th March 1887, not one of these payments is

1909

GOPI NATH SINGH v. HARDEO SINGH.

marked as being made on account of interest. The payment of 1887 is set out as a payment of Rs. 600 on account of interest.

We find on looking into the bond that there is an express provision in it that any payment made under it was first to be applied to the payment of compound interest, next to the payment of simple interest, and lastly to the payment of principal.

In view of this we hold that at the time the parties entered into the bond they did so under circumstances which implied that payment was to be applied to the discharge, first of the particular debt of interest and afterwards to the discharge of the debt of principal.

Next there is the circumstance that the first payment made under the bond was distinctly ear-marked as a payment towards interest, so far coinciding with what we have just held to be the intention of the parties when they entered into the bond.

Then it is not entirely without significance that all the subsequent payments made and endorsed upon the bond without any difference from the first payment with the solitary exception that the "words on account of interest" are wanting. From these circumstances we may safely assume, we think, that the parties intended and understood that the payments were to be and had been made by the debtor as payments on account of interest and that they should have been appropriated by the creditor as payments on account of interest. We also find that in the original suit the Court considered that the payments were on account of interest.

The learned advocate for the judgment-debtors contended that as there was no direction by the judgment-debtors as to how the money was to be appropriated, and as no appropriation was made then and there in the case of any of the payments with the exception of that made on the 26th March 1857, none of these payments could rightly be held to be payments of interest on debt paid as such and none would save limitation from running. In support of his contention he referred us to the case of *Hanmantmal Moti Chand* v. *Rambabai* (1), *Narrunji Bhimji* v. *Mugnirum Chandaji* (2), *Surju Prasad Singh* v. *Khwahish Ali* (3)

(1) [1879] I. L. R., 3 Bom., 198. (2) [1880] I. L. R., 6 Bom., 103.
(3) [1882] I. L. R., 4 All., 512.

In the first of these cases the judgment of the learned Judges of the Bombay High Court starts with the words "It is clear, on the plaintiffs own statement, that there has been no payment of interest as such."

The second case was one of an undefended suit brought upon a running account between plaintiffs who were merchants of Bombay and the defendant who was a trader. There was nothing in the case to show that there had been any payments on the parts of the defendant as interest. In the third case the learned Judges who decided that case say that there was nothing to show that payments were made towards interest as such. In this respect they are all distinct from the present case.

In the course of the argument we were referred to the case of *Damodar Ramchander Bapat* v. *Bai Jankibai* (1). Mr. Justice TYABJI who decided the case held that the question whether sums paid by the judgment-debtor were or were not paid as interest on a debt was a question of fact. He accordingly examined the evidence and found that whether he looked into the nature of the payment itself or the nature of the endorsement, he felt great difficulty in coming to the conclusion that the payments made were payments of interest as such. We agree with the learned Judge that the question is a question of fact in each case and in the present case as we have already pointed out we come to the conclusion from (*a*) the very particular words set out in the bond between the parties, (*b*) the terms in which the first payment was recorded on the bond, (*c*) the record of subsequent payments on the bond, that there is evidence from which it can be rightly inferred that in the present case the payments made by the judgment-debtors were intended to be and were payments of interest as such.

We think that the learned Subordinate Judge was wrong in holding that the application before him was barred by limitation inasmuch as the payments made bring the case down to the year 1899, and well within the period of limitation. We allow the appeal, set aside the decree of the Court below and in accordance with Order 41, Rule 23, direct the case to go back to the lower court with directions to re-admit it in its original number in its

(1) [1903] 5 Bom., L. R., 350.

1909

GOPI NATH SINGH v. HARDEO SINGH.

register of applications and to proceed to determine it according to law. Costs of this appeal to be costs in the case and to follow the event. Fees in this Court will include fees on the higher scale.

Appeal decreed.

1909
January 20.

APPELLATE CRIMINAL.

Before Mr. Justice Griffin.
EMPEROR *v.* JAMNA.*

Penal Code (Act XLV of 1860), section 304A—Administering poison believing it to be a charm—Rash and negligent act—Liability.

Where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious and mixed it with his food believing that by doing so she would become rich. *Held* that her conduct was wanting in that prudence and circumspection which every human being is supposed to exercise, and as by her rash and thoughtless act she caused death she was guilty of an offence under section 304A., Indian Penal Code. *Emperor v. Nagawa* (1) distinguished. *Q.-E. v. Bhakhan* (2), followed.

The facts of this case are as follows:—

The accused was a poor relative of one Lal Singh and lived near his house. On the 25th March 1908, Lal Singh's household became ill after taking food, and four of them died on the next day. The accused was suspected of having administered poison and made a confession that she had received a powder from an enemy of Lal Singh who had told her that if she administered it to Lal Singh she would become rich and Lal Singh would become poor. She mixed that powder with Lal Singh's food. She retracted this confession, but the court below believed it and convicted her under section 304A, Indian Penal Code, and sentenced her to two years' rigorous imprisonment. The prisoner appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant, contended that on the findings of fact arrived at by the learned Sessions Judge there was no case against the accused either under section 304 or 304A. The accused did not know the nature of the substance which she mixed up with the flour. That being so there

* Criminal Appeal No. 1081 of 1908 from an order of H. J. Bell, Sessions Judge of Aligarh, dated the 17th September 1908.

(1) (1902) 4 Bom., L. R., 425. (2) (1887) P. R., 60.

was no intention to cause death or hurt and there was no rash or negligent act. He relied on *Emperor* v. *Nagawa* (1).

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown, submitted that the Bombay case was no doubt in favour of the appellants' contention, but the Punjab Chief Court has consistently maintained the contrary view. He cited *Q.-E.* v. *Musammut Bhakhan* (2), *Q.-E.* v. *Khema* (3), *Q.-E.*, v. *Musammat Sultan* (4). He asked the Court to accept the Punjab view.

GRIFFIN, J.—Musammat Jamna has been convicted of an offence under section 304A of the Indian Penal Code and has been sentenced to two years' rigorous imprisonment. She appeals against her conviction. The learned vakil, who appears for her, has taken me through all the material evidence in the case. His contention is that the evidence on which the conviction mainly rests and the confession of the accused are not sufficient to warrant the conviction. The case has been tried by the learned Sessions Judge of Aligarh with extreme thoroughness and care. His judgment contains an accurate summary of all the evidence in the case, and in it every aspect of the case has been fully considered. On the 25th of March last some food was prepared at the house of one Lal Singh Brahman of village Mahugua. A number of people of Lal Singh's household partook of the food on that and the following day with the result that four persons died and several others became seriously ill. The report of the chemical examiner shows that arsenic was detected in the viscera sent for examination and also in a portion of the food. It is clear then that poison was administered in the food prepared in Lal Singh's house on the 25th March last. It is clear that the poison must have been introduced into the food by some one who had access to the place where the food was prepared. The learned Sessions Judge has shown, in my opinion, correctly that no one in the immediate household of Lal Singh can be suspected of any concern in this poisoning. The accused's own conduct in the course of the investigation directed suspicion towards her. On the 4th April she made a confession before

(1) (1904) 4 Bom., L. R., 425.
(2) (1887) P. R., 50.
(3) (1890) P. R., 8.
(4) (1884) P. R., 35.

the Magistrate in which she admitted that one Badri Prashad, who, to her knowledge, was an enemy of Lal Singh, had given her some white powder telling her to mix it in Lal Singh's food. She said that Badri Prashad told her that if she gave Lal Singh this stuff she would become wealthy and Lal Singh would become poor, and that Badri Prashad also added that if any harm did result, she ought not to mention it to any one. She took the white powder and taking advantage of the temporary absence of Musammat Kundania, who was cooking the food, she mixed the powder with the flour. This confession she afterwards retracted but it was corroborated in material particulars by the evidence of the accused's two daughters, both young girls, whose evidence has impressed the learned Sessions Judge very favourably. I agree with the court below that it is proved that Musammat Jamna did mix the powder with the flour. It is, however, not proved that she knew that the powder was arsenic or any other deleterous substance. The Court below has found her guilty of an offence under section 304A of the Indian Penal Code. It is contended on behalf of the appellant that even on the facts found Musammat Jamna has committed no offence punishable by law. I am referred to a decision—*Emperor* v. *Nagtwa* (1) in which the facts were that the accused administered arsenic to the deceased, her lover, in sweetmeat balls given to him to eat in the belief that it was a charm which would revive love for her, but she did not know that the substance was a deadly poison. In this case it was held that as the evidence did not establish the necessary guilty mind, the accused must be acquitted. The question whether the act of the accused in that case did not come under section 304A was not considered. There is a case much more in point, *Q.-E.* v. *Musammat Bhakhan* (2), in which the facts were that "the accused having an intrigue with a paramour, received poison from her paramour to administer to her husband as a charm, and administered it with the result that death ensued; that the death of the husband was caused by the substance administered to him, the substance being arsenic; but that the accused did not know the substance given to her to be noxious till she had seen its effect." It was held in

(1) (1902) I. L. R., 4 Bom., 425. (2) (1887) P. R., Cr. Judgment, 60

that case that the offence committed by the accused was that punishable under section 304A of the Penal Code, her act not amounting to culpable homicide but being a rash act and having caused the death of her husband. It was further held in that case that "where the accused knew that the substance came from her paramour and was to operate on her husband as a charm it became her duty to ascertain that it was innocuous before she administered it to her husband and culpability was imputable for the absence of that caution and circumspection which ought to have been exercised in ordinary prudence under the circumstances stated." In my opinion the law has been correctly stated in the decision above quoted. Applying the law to the facts of the present case, the accused has in my opinion been properly convicted of an offence under section 304 A of the Indian Penal Code. She took the powder on her own admission from an acknowledged enemy of Lal Singh. She took no precaution whatever to ascertain whether it was noxious or not. Her conduct was wanting in that prudence or circumspection which every human being is supposed to exercise. By her rash and thoughtless act she has made herself responsible for the death of four persons. I dismiss her appeal.

Appeal dismissed.

REVISIONAL CRIMINAL.

1909
February 5.

Before Mr Justice Griffin.
EMPEROR v PANNA LAL.*

Act No. XII of 1896 *(Excise Act), section* 21—*Sale*—*Not for profit.*

P, who held no license under the Excise Act, obtained some methylated spirits from a shop for the secretary of the Jhansi Club, sent it from there to the club, but made no profit on the transaction: *Held* that the transaction did not amount to a sale within the meaning of section 21 of the Excise Act (XII of 1896).

THE material facts of the case appear from the judgment of the Court.

Mr. *C. Dillon* (with whom Babu *Sital Prasad Ghosh*) for the applicant

* Criminal Revision No. 871 of 1908 from an order of H. E. Holme, Sessions Judge of Jhansi, dated the 24th of October 1908, confirming an order of J. H. Christie, Magistrate of Jhansi, dated the 7th of September 1908.

1909

EMPEROR v. PANNA LAL.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

GRIFFIN, J.—This is an application for revision of an order of the Cantonment Magistrate of Jhansi convicting the applicant Panna Lal on two charges under the Excise Act, one under section 21 and the other under section 51.

The facts which form the basis of the first charge are that Panna Lal who holds no license under the Excise Act, had received an order from the secretary of the Jhansi Club, for some methylated spirits. Panna Lal obtained the methylated spirits from another shop and sent it from there on to the club, without making any profit in the transaction. Under the particular circumstances of the case it is difficult to call this transaction a sale. I therefore set aside the conviction and sentence under the first charge.

The second charge against the applicant, which was amply proved, was that he had purchased at a court sale a quantity of wines and spirits knowing that he had no license for possession or sale of such liquor. I am unable to interfere with the order on the second charge.

I allow the application to the extent above indicated and set aside the conviction and sentence under section 21 of the Excise Act. The fine of Rs. 30, if realized, will be refunded. The application is otherwise dismissed.

Order modified.

1909
February 6

MISCELLANEOUS CIVIL.

Before Mr. Justice Aikman.

IN THE MATTER OF SHEIKH MAQBUL AHMAD (APPLICANT.)*

Act No. VII of 1870 (Court-fees Act), Schedule 1, section 5, articles 4, 5—Court-fee—Application for review affecting only portion of decree.

Held that the proper fee leviable on an application for review of judgment when it refers only to a portion of the decree is the fee leviable on the plaint or memorandum of appeal, in which the judgment, review of which is asked for, is passed—*Proceedings, Jan. 16, 1872* (1), *In re Manohar Tambekar* (2), not followed. *Nobin Chundra* v. *Uzir Ali* (3), and *Imdad Hasan* v. *Badri Prasad* (4), followed.

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* Stamp Reference in review of Judgment filed in first appeal No. 291 of 1901.

(1) (1872) 7. Mad., H. C. R., app. 1.
(2) (1879) I. L. R., 4, Bom., 26.
(3) (1898) 3 C. W. N., 293
(4) Weekly Notes, 1898, 212.

THIS was a reference made by the Taxing officer to the Taxing Judge under section 5 of the Court Fees Act.

The plaintiff's suit was for possession of a 12 biswas zamindari share and demolition of buildings and mesne profits. The defendants pleaded that the plaintiff was only entitled to 11 biswas 17 biswansi 2 kachwansi and not to 12 biswas.

The plaintiff was really entitled to 11 biswas 7 biswansi 2 kachwansi, and the 17 biswansi mentioned was a clerical error. A decree was passed in favour of the plaintiff for 11 biswas 17 biswansi 2 kachwansi and also for damages. There was an appeal to the High Court against the decree as regards damages and other matters not material to the present report. The present application for Review of judgment as regards the mistake of 10 biswansi was presented to the Court and court fee was paid with reference to the valuation of the 10 biswansi share regarding which correction was prayed for. On the application being presented to the office for stamp report the Stamp Reporter made the following report:—

"This is an application for review of judgment in F. A. No. 291 of 1901, decided on the 10th of December 1903, as regards 10 biswansi share out of 12 biswas share in mauza Tilokpur, which is one of the villages claimed in that suit. The applicant has paid court fees on five times the Government Revenue of that share. I beg to submit that under article 4, schedule 1 of Act VII of 1870, the proper fee leviable on this application for review is the fee that was leviable on the memorandum of appeal, namely Rs. 1,015 (please see W. N., 1898, p. 212 and 3 C. W. N., 292), Rs. 21-12-0 having been paid, there is therefore a deficiency of Rs. 993-4-0 to be made good by the applicant."

The following objection was preferred to the office report by Maulvi *Ghulam Mujtaba* who appeared for the applicant:—

"I am afraid I cannot accept the correctness of the office report and it is necessary to state shortly the facts of the case.

The suit out of which the appeal arose was brought for the following reliefs:—

(a) Possession of the zamindari property and land occupied by factories valued at Rs. 26,545-0-9.

(b) Rs. 44,565-14-7 on account of damages for the demolition of certain buildings,

(c) Rs. 212-6-2 the amount of the Government Revenue paid by the plaintiff.

(d) Mesne profits valued at Rs. 3,675.

The principal defendant was Sheikh Ali Ahmad, who held the property claimed in relief (a) under a lease executed by Musammat Chunni Kuar, and the

1909

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

applicant for the Review of judgment was made party to the suit upon the ground that defendant No. 1 purchased a portion of a factory in Mauza Chalasni in his name (paragraph 18 of plaint) and also upon the ground that he was related to and was in collusion with defendant No. 1. It will thus appear that the suit embraced distinct subjects. The defence raised on behalf of the applicant for Review of judgment was that he had *nothing to do with the property in dispute* except as regards a portion of the factory (paragraph 33 of *written statement*) and fractional share in mauza Tilokpur (paragraph 37) one of the villages claimed in the suit, and he consequently pleaded that the suit was bad for misjoinder of causes of action and parties. The applicant's interest in the suit was limited to a share in factory and a share in Tilokpur. The plea of the applicant as regards the share in Tilokpur was practically admitted by the plaintiff.

The suit was decreed by the court of first instance in respect of *(a)* except as to a share in Tilokpur and *(b)* to the extent of Rs. 7,629 and was dismissed as to other reliefs and the question of mesne profits was reserved for the execution department. Reliefs *(a)* and *(b)* being decreed against all the defendants, an appeal was preferred by all of them and was valued at Rs. 33,674-0-0. The appeal again embraced distinct subjects *viz.*, reliefs *(a)* and *(b)* and by the decree of this Court the claim for damages, relief *(b)* was altogether dismissed and for all intents and purposes the decree of the High Court was limited to the claim for possession of property held by Sheikh Ali Ahmad under the leases with which the applicant had nothing to do.

The present application for Review is limited to a 10 biswansi share in Tilokpur and sufficient court fee has been paid upon that share and no order on Review will effect any other part of the judgment passed by this Honourable Court.

The principle laid down in 7 Madras High Court Reports, page 1, Appendix, and specially 4 Bombay Indian Law Reports, page 25, applies to the facts of this case, which have not been dissented from in 3 Calc. W. N.

The present case is distinguishable from the Calcutta case and the case reported in the Weekly Notes for 1898, because in those cases the suit did not embrace several distinct subjects nor was the interest of the applicant for Review in those cases limited to a single item of property as in the case here.

For the reason submitted above, I contend that the court fee paid is sufficient."

The Taxing officer referred the case to the Taxing Judge and his report was as follows:—

"In this case the plaintiff sued for possession of property situate in several villages, including Tilokpur, and for damages, and certain other reliefs which do not concern the question for decision. The court of first instance granted the plaintiff's claim in full as to possession and damages. On appeal the High Court granted the plaintiff's claim for possession, but dismissed his suit as regards damages. Among the property for possession of which the High Court granted a decree to the plaintiff was a share in Tilokpur amounting to 11 biswas 17 biswansis 2 kachwansis. It is alleged that this share should be 11 biswas 7

biswansi 2 kachwansi, and on this ground this application has been filed for review of the judgment of the High Court. There were several defendants to this suit and it is admitted that the present defendant-applicant's interest was limited to the property in Tilokpur.

The question is how the application should be stamped with reference to the provisions of article 4 of the first schedule to the Court Fees Act. The office contends that the proper stamp is that paid on the original appeal in the High Court.

The learned counsel for the objector contends that it should be stamped on the value of 10 biswansis with reference to which correction is sought.

It seems to me that it might also be stamped with reference to the value of the share in Tilokpur which represented the applicant's interest in the appeal. Rulings are divergent. A ruling in C. W. N., III, p. 293; supports the view of the office. It was held in this case that an application for review *as to costs should have been stamped* with reference to the entire value of the suit.

On the other hand a ruling in the Madras High Court Report, 1871-1872, p. 1. lays down that the Court Fee must be levied on the amount which would be obtained if a review were granted.

There is also a ruling by the Bombay Court reported in I. L. R., 4 Bom., p. 26 which appears to support the suggestion I have made above. In it, it was held that when a "plaint or memorandum of appeal comprises a number of claim and a portion only of such claims has been allowed by the judgment the applicant for review should be required to stamp his application for review with a fee sufficient to cover the amount of the claim in regard to which he wishes the court to review its judgment."

This case is not exactly on all fours with the present one. But it has certain points of resemblance. It is admitted that the present applicant was interested in only a part of the subject-matter of the suit and appeal. Therefore only part of the decrees of the first court and the appellate court affected him. It is only this part of the decree of the appellate court with reference to which he seeks review. It is therefore only a small extension of the principle laid down in the Bombay ruling to require him to pay fees with respect to this part alone. I might further point out that the present applicant who was one of the defendants in the original suit might have brought his appeal as to the part of the original decree affecting him by *himself*. In that case of course he would have only had to pay fees on the present application with reference to the value of that appeal alone."

As the rulings are conflicting, I submit the case for the order of the Honourable Taxing Judge."

The case being laid before the Taxing Judge,

Maulvi *Ghulam Mujtaba*, for the applicant, contended that the governing word in schedule 1, article 4, was 'leviable,' which did not mean 'levied,' but meant that the fee on an application for Review was the fee payable on the memorandum of appeal,

1903

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

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Maulvi *Ghulam Mujtaba*, for the applicant, contended that the governing word in schedule 1, article 4, was 'leviable,' which did not mean 'levied,' but meant that the fee on an application for Review was the fee payable on the memorandum of appeal,

1909

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

if the appeal were limited to the subject-matter of the Review. If the legislature had intended that the fee paid on the memorandum of appeal would be payable on an application for Review the word used would have been 'levied' and not 'leviable.' In construing fiscal enactments a construction favourable to the subject should be placed upon the words. *Amanat Begam* v. *Bhajan Lal* (1), and *Anonymous case* (2).

Moreover a literal construction would lead to hardship and absurdity and if a literal construction leads to anomalies or absurdities, it must be avoided. *Kaylash Chandra* v. *Tarak Nath* (3) *Proceedings, 16th January,* 1872 (4). *In re Manohar* v. *Tambekar* (5). *Ful Chand* v. *Bai Ichha* (6). *Nobin Chandra* v. *Uzir Ali* (7). *Imdad Hasan* v. *Badri Prasad* (8).

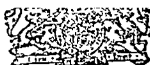
The Government Advocate (Mr. *W. Wallach*), for the Crown, submitted that the words "the plaint or memorandum of appeal" could only mean the plaint or memorandum of appeal in which the judgment was pronounced.

AIKMAN, J.—This is a reference under section 5 of the Court Fees Act, 1870.

The question for decision is as to the proper fee leviable on an application for review of judgment presented on or after the 90th day from the date of the decree, when the application refers only to a portion of the decree. Article 4, schedule I, of the Act provides that the fee leviable on an application for review of judgment presented on or after the 90th day from the date of the decree is "the fee leviable on the plaint or memorandum of appeal." I have had the advantage of hearing the question argued by the learned vakil for the applicant and by the learned Government Advocate as representing the Crown. The Act, it will be seen, draws no distinction between applications for review of judgment when the application affects the whole of the decree or only a portion thereof. No doubt the leading principle of the Act is that the amount of the court fee bears relation to the amount of relief sought, but in the words which I have to construe, I can find nothing to make this principle applicable. The

(1) (1886) I. L. R., 8 All. 433, 441, F. B.
(2) (1884) I. L. R., 10 Calc. 274, 282.
(3) (1897) I. L. R., 25 Calc. 571, 578.
(4) (1872) 7 Mad. H. C. R., App. I.
(5) (1879) I. L. R., 4 Bom. 23, 27.
(6) (1888) I. L. R., 13 Bom. 63.
(7) (1898) 3 C. W. N., 292.
(8) (1898) 18 A. W. N., 201.

VOL. XXXI [PART VI.



THE INDIAN LAW REPORTS.

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High Court, Allahabad ... W. K. PORTER, *Gray's Inn.* On leave.

L. M. BANERJI, *Vakil, High Court.* Offg.

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TABLE OF CASES CITED.

PAGE.

PAGE.

well happen that a father possessed of ready cash or other moveable property might notwithstanding mortgage the family property to secure his own private debt. It seems to me that if the sons and grandsons are liable on a mortgage of the family property made to secure the private debt of the father incurred a year or two previously and if the sons and grandsons cannot set aside a sale made in consideration of such a debt, it ought to follow that they are equally liable on a mortgage made to secure a *bona fide* debt although incurred simultaneously with the making of the mortgage. It is said that such a decision destroys the principle of Hindi Law that the joint property can only be alienated for legal necessity or for a pious purpose. Perhaps this would be so if there was any principle left to destroy. In deciding in favour of the plaintiff I wish it understood that I only do so because I think that such a decision necessarily follows from the Full Bench ruling in *Badri Prasad* v. *Madan Lal*. If I could see any real distinction between the private debt of a Hindu father before the mortgage and a debt incurred simultaneously with the mortgage I would be glad to decide in favour of the defendants, which I think would be more in accord with the principle of Hindu Law that no member of a joint family can alienate save for legal necessity.

I would dismiss the appeal.

BY THE COURT.—The first question in the appeal having been determined by the majority of the Full Bench in favour of the appellants, the counsel representing the parties now ask that the appeal be referred back to the bench which referred the matter to a Full Bench for determination of the only other question remaining undecided. We order accordingly. The bench in question will finally determine the appeal including the question of costs.

a certificate under the Act. Her application however was opposed by Kallu Mal and others who filed objections setting up a will alleged to have been made by the deceased. A draft was produced which is a draft of a somewhat elaborate will. Lachman Sarup was produced on behalf of the objectors, and deposed that he had written out this draft (which we will hereafter refer to as ex. A.) at the dictation of the deceased. He says that he explained the contents of the will to him, that it took him two days to prepare the document, and that at the close of each day he read it to the deceased. A doctor named Ram Chandar was also produced and he corroborated Lachman Sarup and said that four or five days before his death the deceased handed him Ex. A, which, he said, was a draft of his will. The deceased told him that he had appointed him a trustee under his will and asked him to take the draft and have it copied out fair for his signature. The deceased died without ever having executed the will. He wrote a letter to the Bank at Meerut giving certain directions as to a sum of Rs. 2,000 which he had in deposit with the bank which directions were strictly in accordance with his will In this letter he says that he is making a will. It also appears that after the draft had been prepared the deceased wrote to Lachman Sarup about leaving Rs. 200 for a girls' school. The deceased seemed to think that he had mentioned this matter before. Lachman Sarup in reply told him that if he had mentioned it to him, he, Lachman Sarup, had forgotten it but that it might be added in the proper place. In the court below the appellant's case was that the deceased was not in his proper senses for a long time before his death. The deceased died on the 12th of January 1906. We think that had the application been made to us in the first instance, we should hardly have decided the validity or invalidity of the will on a summary application for a certificate. The Court might have exercised the discretion given to it by section 7, clause (3) of the Act; or the application might have been postponed and the objectors called upon to institute within a limited time a suit to obtain probate of the alleged will. The court however had undoubted jurisdiction to try the question whether or not there was a will. If the deceased had made a will in the terms alleged, the applicant Musammat Janki was not entitled to a

1908

JANKI
v.
KALLU MAL.

certificate. The court below having tried the question and heard all the evidence, we think that we would only be putting the parties to unnecessary expense and prolonged litigation if we were not now to decide in appeal the question already decided by the court below. We have no reason to think that further evidence could be produced on either side and we think that the court below was quite justified in believing the evidence adduced by the objectors as to the testamentary capacity of the deceased. The question remains whether or not he in fact made a will before he died. There cannot be the slightest doubt on the evidence that the deceased intended to make his will. We believe the evidence of Lachman Sarup and Dr. Ram Chandar. The deceased, according to their evidence, had dictated his wishes with regard to this property. He had written about the girls' school and the bequest in favour of it of course must now be deemed part of his will. There is no evidence of any kind that he intended to make any other change in the disposition of his property. Dr. *Tej Bahadur* urges that the testator might, if he had an opportunity, have altered his mind. There is no doubt he might and in the same way a man can always revoke or alter his will. But there is no evidence whatever that the deceased was in a state of doubt as to his intentions. We think it cannot be argued that the mere fact that he had not executed the document itself prevented what Lachman Sarup had taken down at his dictation from being his will. According to Hindu Law it is not necessary that a will should be executed by the testator. Under all the circumstances of the case we think the conclusion at which the court below arrived, namely, that Shadi Ram had before his death made a will in the terms alleged by the objectors, was justified by the evidence. We accordingly dismiss the appeal but without costs, as we consider that the objectors ought to have taken some steps to prove the will at an earlier date.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

1904
October 1

RICHARD ROSS SKINNER (PLAINTIFF) *v.* DURGA PRASAD AND ANOTHER (DEFENDANTS.)*

THOMAS WILLIAM SKINNER (DEFENDANT) *v.* RICHARD ROSS SKINNER (PLAINTIFF)

AND

THOMAS WILLIAM SKINNER (PLAINTIFF) *v.* DURGA PRASAD (DEFENDANT).

Will—Construction of document—Act No. X of 1865 (Indian Succession Act), section 84—Devise to "eldest son and to his lawful male children according to the law of inheritance"—Marriage—Marriage between Christian and Muhammadan performed according to Muhammadan rites.

Thomas Skinner, domiciled in the North-Western Provinces, and owner of considerable landed property, died in 1865, leaving a will, made on the 22nd of October 1864, *i.e.*, before the passing of the Indian Succession Act, by which, amongst other dispositions, it was provided that—"my private zamindari, presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant, may at my demise descend to my eldest son, Thomas Brown Skinner and to his lawful male children according to the law of inheritance. In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above-mentioned private zamindari, *et cetra*, shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, *et cetra*, shall descend to my female children or in the event of their death, to the female children born in wedlock of my sons in succession."

Held that the construction of such a will was not governed by English law or by the provisions of the Indian Succession Act, 1865, which was not retrospective; but the will was to be construed, as was laid down by the Privy Council in the case of *Barlow* v. *Orde* (1) according to principles of justice, equity and good conscience. So construing the will and having regard to the circumstances of the family at the time of its execution, the testator must not be taken to have intended to confer an absolute estate on his eldest son, but that his sons who should acquire the property should have a life estate only, and that the absolute estate should devolve upon the eldest son of the testator who should be entitled to the property for life and should leave a son surviving him. *Secretary of State* v. *The Administrator General of Bengal* (2), *Abraham* v. *Abraham* (3), *Broughton* v. *Pogose* (4), referred to.

Semble that a marriage ceremony performed according to Muhammadan rites between a Christian man and a Muhammadan woman can create no valid marriage between the parties.

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* First Appeal No. 123 of 1902, from a decree of A. Rahman, Subordinate Judge of Meerut, dated the 17th of March 1902, together with F.A. No. 103 and F.A. No. 107 of 1902.

(1) (1870) 13 Moo. I. A., 277.
(2) (1868) 1 B. L. R., 87, O. C.
(3) (1863) 9 Moo. I. A., 193, 199.
(4) (1873) 12 B. L. R., 74.

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

THE fact out of which these three appeals arose are fully set forth in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellant.

Messrs *C. Dillon*, *T. Conlan*, *B. E. O'Conor*, *Jogindro Nath Chaudhri*, *Ghulam Mujtaba* and *Durga Charan Banerji*, for the respondents, in F. A. No. 123.

Messrs. *T. Conlan*, *B. E. O'Conor* and Maulvi *Ghulam Mujtaba* for the appellant.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondent, in F. A. No. 106.

Mr. *T. Conlan*, Mr. *B. E. O'Conor* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *C. Dillon*, Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the respondent in F. A. No. 107.

STANLEY, C. J., and BURKITT, J.—These three appeals arise out of two suits which were brought in the Court of the Subordinate Judge of Meerut, one by Richard Ross Skinner against one Durga Prasad and Thomas William Skinner and the other by Thomas William Skinner against Durga Prasad to recover possession of the village of Sherpur in the district of Bulandshahr and for mesne profits; both of which suits were dismissed. Appeal No. 106 is an appeal by Thomas William Skinner in the suit brought by Richard Ross Skinner against the finding of the lower Court that he is not a legitimate son of the late Thomas Brown Skinner, who was the father of himself and brother of Richard Ross Skinner. Appeal No. 107 is an appeal by the same appellant in the suit which was instituted by him against the same finding, and also against the decision of the lower Court upon the construction of the will of the late Thomas Skinner, grandfather of the appellant. Appeal No. 123 is an appeal by Richard Ross Skinner in the suit instituted by him against the decision of the Court below holding that Thomas Brown Skinner took an absolute estate in the zamindari property of the testator, Thomas Skinner. The three appeals have been heard together, and one judgment will govern all.

Two questions, and two questions only, arise in the case. One is as to the true construction of the will of the late Thomas

Skinner, dated the 22nd of October 1864; and the other is the question of the legitimacy of Thomas William Skinner.

The founder of the family was Colonel James Skinner, C B., an Indian soldier of fortune, who had for military services obtained from the East India Company in the beginning of the last century a grant of a large estate situate in the Bulandshahr District in the North-Western Provinces. The origin of the family is obscure. It appears from a suit which was instituted over thirty years ago to establish the will of Major James Skinner, an illegitimate son of Colonel Skinner, that it was then alleged, and there was some proof, that Colonel Skinner was illegitimate, being probably the child of a native woman by a European father. That case went on appeal to their Lordships of the Privy Council, and it is to be found reported in 13 Moore's Indian Appeals, p 277, and is entitled *Musammat Fanny Barlow* v *Sophia Eveline Orde*. In the course of his judgment in that appeal Lord Westbury observes of the origin of Colonel Skinner as follows .—His origin is unknown; being illegimate he belonged to no family, and all that can be collected is that he was probably a soldier of fortune who rose by his courage and military skill to some distinction in the service of the East India Company." The testator in the present case, Thomas Skinner, is a son of Colonel James Skinner. He was a resident of Bilaspur in the Bulandshahr district, and at the time of his death, which occurred on the 9th of November 1864, was possessed of immovable property of considerable extent and value. The testator had three sons and four daughters by his wife Eliza Ann Skinner, of whom Thomas Brown Skinner was the eldest son and Richard Ross Skinner the second son. It appears that Thomas Brown Skinner was born before the marriage of his parents, and so was illegitimate. By his will, which is divided into seven paragraphs, Thomas Skinner provided for the payment of his debts and an annuity for his wife, and also allowances for his children, and then as to his zamindari he gave the following directions in the fourth and fifth paragraphs, namely :—" that my private zamindari, presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

time to time to the original grant, may at my demise descend to my eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance. In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above-mentioned private zamindari, *et cetra*, shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, *et cetra*. shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession." The will was executed on the 22nd of October 1864, that is, 18 days before the testator's death. After his death his son Thomas Brown Skinner succeeded to the property, but he did not enjoy it long. He appears to have been of extravagant tastes and soon became immersed in debt. In execution of a simple money decree obtained against him by Durga Prasad his interest in the property in dispute in these appeals was sold and purchased by Durga Prasad. It is contended on behalf of the latter that upon the true construction of the will of Thomas Skinner his son Thomas Brown Skinner acquired an absolute estate in the property, and that he (Durga Prasad) is entitled now by virtue of his purchase to an absolute estate. Thomas William Skinner, alleging that he is the legitimate son of Thomas Brown Skinner, contends that his father had merely a life estate in the property and that upon his death the property devolved upon him. Richard Ross Skinner also supports the contention of Thomas William Skinner that his father had only a life estate, but he alleges that Thomas Brown Skinner is illegitimate, and consequently is not entitled to the estate, and he claims it as being the eldest legitimate son.

The learned Subordinate Judge has found that Thomas William Skinner was illegitimate, but he has decided that, according to the true construction of the will of Thomas Skinner, Thomas Brown Skinner took an absolute estate, and consequently Durga Prasad is now entitled to the property absolutely. He therefore dismissed both suits. Hence the present appeals.

There are two questions therefore now before us. The first is as to the true construction of the will of Thomas Skinner in regard to the devise of his immovable property, and the second

is as to the legitimacy of Thomas William Skinner. We shall first deal with the will. The testator died before the passing of the Indian Succession Act of 1865, so that that Act does not aid us in the matter. His domicile was in the North-Western Provinces of India, and there is no particular law of that domicile applicable to this case. The Privy Council held in the case of *Barlow* v. *Orde*, to which we have made allusion, and which had to do with the will of Colonel James Skinner, son of the founder of the family, that having regard to the circumstances of the family it was impossible "to affirm that any particular law is applicable to the construction of the Colonel's will or the regulation of his succession" and that "any question that may arise respecting them must therefore be determined by the principles of natural justice." That case, their Lordships held, fell to be decided, as directed by the Regulations, by the principles of natural justice, equity and good conscience. There was nothing before their Lordships in that case to indicate the religious belief or profession of Colonel Skinner or of his family. In the case of the testator Thomas Skinner and his family the evidence shows that they were Christians, but we do not think that this fact would justify us in interpreting his will upon any other principles than those which were applied in the case of *Barlow* v. *Orde*. We do not think that we should apply to its interpretation any technical rules of construction such as are applicable to English wills. The territorial law of British India is not strictly speaking English law but a modified form of English law—*The Secretary of State* v. *The Administrator General of Bengal* (1), *Abraham* v. *Abraham* (2), and *Broughton* v. *Pegose* (3). It was contended before us by the learned counsel for the respondent Durga Prasad that the will should be construed according to English law, and that according to that law, under the rule in *Wild's* case (6 Coke, 17), Thomas Brown Skinner took an estate tail, and that, as we understand the argument, such an estate must be regarded as an absolute estate in these Provinces, where estates tail are unknown. The qualified estate known as an estate tail had its origin in the ancient feudal system, the foundation of English jurisprudence as regards landed property. That system finds

(1) (1868) 1 B. L. R., 87 O. C.
(2) (1863) 9 Moo. I. A., 193, 199.
(3) (1873) 12 B. L. R., 74.

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

no place in the territorial law of these Provinces. In Western India a land tenure is to be found closely resembling it, as, for example, the *Jaghirs* of the Mahratta country, but in these Provinces no such tenure exists. If it had been possible to create an estate tail in the land and the estate so created vested in Thomas Brown Skinner was such an estate, the case of the respondent Durga Prasad would not, as it appears to us, be advanced, for that estate was never barred, if there existed a means of barring it, and consequently on the death of Thomas Brown Skinner it passed on to the next heir. The learned counsel for Durga Prasad recognized this difficulty and was obliged to call in aid of his argument the provisions of section 84 of the Indian Succession Act of 1865, asking us to hold that words which in a devise of land in England would confer an estate tail would in this country pass the whole interest of the testator. He asked us to apply this section as if the Act had retroactive operation. Under that section, unless a contrary intention appear by a will, the whole interest of a testator will pass under a gift to a man and the heirs male of his body, words which in England are appropriate to confer an estate tail. We cannot accede to this argument. The Succession Act is not retroactive, and even if it were, the section in question is only applicable if a contrary intention does not appear by the will. Now the rule in *Wild's* case is based upon the presumed intention of the devisor that the children of the devisee should take the property, and that, inasmuch as they cannot take as immediate devisees, inasmuch as they are not in existence, and by way of remainder they cannot take, for that was not the devisor's intent, the gift being immediate, therefore the word "children" shall be taken as a word of limitation. The rule is only a rule of construction, but it is a rule which in England will not be departed from in cases properly falling within its scope—*Clifford* v. *Koe* (1) but it has been frequently criticised as a rule which in many instances has defeated the intention of testators. That eminent lawyer Sir Edward Sugden, when Lord Chancellor of Ireland, in the case of *Heron* v. *Stokes* (2) suggested that the more natural construction of a gift to a man and his children, there being no

(1) (1880) 5 A. C., 447. (2) (1842) Dr. and War., 89, s. c. 59, R. R. 652.

children *in esse* at the time, and that which he would have adopted in the absence of authority the other way would be to hold it to be a good gift to the parent for life with remainder to the children. Now the primary object in construing a will is to ascertain the intention of the testator. In order to gather what the intention of the testator was in regard to the disposition of his zamindari we must read the fourth and fifth paragraphs of his will together. In the fourth paragraph he directs that it shall descend to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance. The words "according to the law of inheritance" must not be overlooked. They seem to indicate that the children of Thomas Brown Skinner were objects of the testator's bounty, and that the words "lawful male children" were not used merely as words of limitation, that the testator's intention was that they should enjoy the property after the death of their father *according to the law of inheritance;* that is, that the eldest son living at the father's death should succeed to the estate. If the words to "his lawful male children" are treated as words of limitation merely, that is, as marking out the estate which Thomas Brown Skinner was to enjoy, the words "according to the law of inheritance" are unnecessary and out of place. The learned Subordinate Judge does not appear to us to have attached due weight to these words, or to have properly interpreted them. He says :—"Now he (the testator) does not say that his eldest son, Thomas Brown Skinner, should only have a life interest, and we have no right to import into the will those words. Then again, when he says clearly that the property should descend to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance, we all know that according to the law of inheritance the eldest son of Thomas Brown Skinner does not take only a life interest." The answer to this is that the testator did not give the estate to Thomas Brown Skinner according to the law of inheritance, but he gave it to Thomas Brown and to his lawful male children according to that law. The words "according to the law of inheritance" are not so much applicable to and explanatory of the gift to Thomas Brown Skinner

1904

RICHARD ROSS SKINNER v. DURGA PRASAD.

as they are of the gift to his lawful male children. If the testator had intended to give the property absolutely to Thomas Brown Skinner, the introduction of the words "and to his lawful male children" was quite unnecessary and inappropriate. The succeeding paragraph makes this more clear. By it the testator provides that if Thomas Brown Skinner should die without lawful male children his property should descend to the testator's next male heir, *i.e.*, to his second, or other son who should be living at the death of Thomas Brown Skinner. Then follows the provision that if all his sons should die without lawful male children, the zamindari should descend to his female children, and in default of such children, then to the female children of his sons in succession. Reading these two paragraphs together, it appears to us that it was clearly not the intention of the testator to give an absolute estate in his zamindari to Thomas Brown Skinner. The testator indicates his wish that his sons who shall acquire the property shall have a life estate only and that the absolute estate shall devolve upon the eldest son of the son of the testator who shall be entitled to the property for life and shall leave a son surviving him.

In order to gather the intentions of the testator we must place ourselves in his position and see what were the circumstances of the family, the will was made shortly before his death. He had a wife. Eliza Ann Skinner, and six children, namely, three sons and three daughters. Of these children the two eldest Thomas Brown and a daughter Jane Sophia were not born in wedlock, the testator having been married to their mother after their birth. It seems highly improbable that, if the intention of the testator was to give his eldest son an absolute estate, he should have introduced into his will elaborate provisions for the devolution of the property such as are contained in paragraphs 4 and 5 of the will. If such was his intention he would not, we think, have gone on to provide for the devolution of the property, not merely in the event of the death of Thomas Brown Skinner, in his (the testator's) lifetime, but for the succession of daughters in the event of his sons dying without male issue. It is evident that the testator was desirous that his zamindari should be retained in the family, and this was not unnatural seeing that it had been

given to him as a reward for public services. In the 6th paragraph of his will, in which he makes provision for the payment of his debts, he directs that "on no account shall my private zamindari, *et cetera*, be sold to pay such debts." Reading the will as a whole and taking into consideration the circumstances, we have no hesitation in holding that Thomas Brown Skinner took merely a life estate and not an absolute estate in the property.

[*The remainder of the judgment, dealing entirely with matters of fact, is not reported. But see Weekly Notes* 1904, *p.* 213.—*Ed.*]

1908 *December*

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.
ROBERT SKINNER AND OTHERS (DEFENDANTS) *v.* CHANDAN SINGH, AND ANOTHER (PLAINTIFFS) AND BESHUN AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (Indian Evidence Act), section 35—Regulation No. VII of 1822, section 9—Duties of Collectors and Settlement Officers—Entries in khewats and khataunis.

Under the provisions of Regulation No. VII of 1822 settlement officers had to ascertain "the real nature and extent of the interests held, more especially where several persons may hold interests in the subject-matter of *different kinds* or degrees", *held* that this included the case of mortgagors and mortgagees.

Held also that entries in *khewats* and *khataunis* made at settlements under Regulation No. VII of 1882 are admissible in evidence under section 35, Indian Evidence Act, 1872.

THE facts of the case are as follows:—

The plaintiffs brought the suit on the allegation that the property in dispute was mortgaged under a mortgage-deed, dated the 21st of April 1847, to the predecessors of the defendants and that the plaintiffs, as the representatives of the mortgagors, were entitled to redeem the mortgage. The plaintiffs not being able to produce a copy of the mortgage-deed, relied upon certain entries in the revenue papers prepared at the settlements which showed the defendants and their predecessors to be mortgagees of the property in dispute. The contesting defendants pleaded that they were in proprietary possession of the land in dispute, that the entries in the revenue papers were incorrect and that those entries were not admissible in evidence. The court below decreed the suit. The defendants appealed.

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* First Appeal No. 111 of 1907, from a decree of H. David, Subordinate Judge of Meerut, dated the 16th of February 1907.

1908

ROBERT SKINNER v. CHANDAN SINGH.

Mr. *B. E. O'Conor* (with him Maulvi *Ghulam Mujtaba*), for the appellants, contended, *inter alia*, that the entries on which the plaintiffs-respondents relied were not admissible in evidence and that the settlement officers went beyond the limit of their powers in recording these entries.

Pandit *Moti Lal Nehru* (with him Mr. *Ismail Khan*), for the respondents, submitted that these entries were admissible in evidence having been recorded in accordance with Regulation VII of 1822. He cited *Lekraj Kuar* v. *Mahpal Singh* (1), *Isri Singh* v. *Ganga* (2) and *Muhammad Hasan* v. *Munna Lal* (3).

Ghulam Mujtaba replied.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was a suit for the redemption of a mortgage, dated the 21st of April 1847, stated to have been executed in favour of certain members of the Skinner family to secure a sum of Rs. 6,288. On payment of this sum the property was according to the evidence to be redeemable. The plaintiffs are admittedly some of the heirs of the mortgagors and entitled to redeem if they can establish that the property is in the possession of the defendants mortgagees as mortgagees by virtue of the alleged mortgage. The learned Subordinate Judge of Meerut after consideration of the evidence adduced in support of the plaintiff's case passed a decree for redemption. From this decree the present appeal has been preferred and the only question before us is as to the sufficiency of evidence adduced for the plaintiffs in proof of alleged mortgage.

[Their Lordships then discussed the evidence and proceeded].

It appears that in the year 1833 a settlement of the property in question with other property was made under the supervision of Mr. Elliot as settlement officer, and in the *khewat* prepared on the occasion of that settlement the predecessors in title of the plaintiffs are shown to have been the owners of the property in dispute. In the next settlement described as the *settlement* of Mohur Singh, which was prepared during the years 1853 to 1858, the predecessors in title of the defendants mortgagees,

(1) (1879) I. L. R., 5 Calc., 744. (2) (1880) I. L. R., 2 All., 876.
(3) (1886) I. L. R., 8 All., 434.

whom we shall shortly describe as the Skinner family, are mentioned as "mortgagees of the property" whilst the alleged mortgagors are specified as "mortgagors." This is the settlement which followed that of Mr. Elliot in which there is no reference to the mortgage in favour of the members of the Skinner family. In a subsequent specification of shares of the property in dispute, prepared in the year 1276 *Fasli*, corresponding to the year 1869, we have entries in which not merely is the mortgage referred to but the details of it are given. In column 4, in which are recorded the names of co-sharers, several members of the Skinner family, whom it is unnecessary to mention particularly, are described as owners of five shares in all. They are described as "Europeans, residents of Bilaspur, mortgagees of the property of Darjan Singh and Bhag Singh, sons of Kunwar Singh, mortgagor. This property has been jointly mortgaged under mortgage-deed for Rs. 6,288, dated the 21st of April 1847, along with that of Har Sahai and others. When the mortgagors shall pay the entire amount, the mortgage shall be redeemed." Later on in this document under serial No. 5 of the *khata* a similar entry appears. We find from the endorsement, that this *khewat* was prepared with the consent of the proprietors and verified. There is also this endorsement upon it:—"To-day, all the proprietors verified this *khewat* in my presence and they raised no objection." It thus appears that all the parties including the Skinner family verified the *khewat* and the entries in it, and admitted that the entries were correct. We further find from this *khewat* that members of the Skinner family held portion of mauza Tatarpur as proprietors. At serial No. 19 of the *khata* Musammat Victoria, daughter of Mr. George Skinner, and others are described as owners of that *khata* in equal shares, and opposite serial No. 22 of the same *khewat*, Captain Hercules Skinner and others are described as owners in equal shares of that *khata*, being vendees of the property of Munawar Ali and Habib Ali, vendors. Thus we gather from this *khewat* that not merely the members of the Skinner family held portion of the property as proprietors but also were entitled as mortgagees to other portions. In addition to this, in the *khatauni* of 1273 *Fasli*, corresponding to the

1908

ROBERT SKINNER v. CHANDAN SINGH.

years 1868 and 1869, we find an entry containing particulars of the mortgage corresponding with the entry in the *khewat* to which we have already referred. In it (opposite to serial No. 6) Musammat Victoria and other members of the Skinner family are described as mortgagees of the property of Darjan Singh and Bhag Singh, sons of Kunwar Singh mortgagor, deceased, and it is stated that the property has been jointly mortgaged under a mortgage-deed, dated 21st of April 1847, to secure Rs. 6,288 along with the property of Har Sahai, and then there is this entry that "when the mortgagors shall pay the entire amount the mortgage shall be redeemed." In this document at serial No. 11, Musammat Victoria and other members of the Skinner family are shown as owners in equal shares of certain portion of the property to which the *khatauni* has reference and they are represented as owning that property under a decree against one Hasina. Again at serial Nos. 14, 19, 23 and subsequent numbers, the mortgage of the 21st of April 1847 is referred to and in serial Nos. 158, 159 and other numbers some of the members of the family are described as owners being vendees of the property of Munawar Ali and Wasiat Ali, vendors. From this document also it is evident that the members of this family acquired portion of the property by sale in addition to the property which they held as mortgagees.

It is said that these entries were made by the settlement officer in excess of his authority and a great part of the argument addressed to us has been devoted to this question. The settlements in question were prepared when Regulation No. VII of 1822 was in force and we have to see whether in view of the provisions of that Regulation the settlement officer had authority to give the particulars to which exception is taken by the learned counsel for the appellants. The language of this Regulation is extremely wide. In the section which deals with the duties of Collectors and other officers exercising the powers given by the Regulation (namely section 9), we find the following direction:—"The proceedings shall embrace the formation of as accurate a record as possible of all local usage connected with landed tenures, as full as practicable a specification of all the persons enjoying possession and property

of the soil or vested with any heritable or transferable interest in the land or the rents of it, care being taken to distinguish the different modes of possession and property, and the real nature and extent of the interest held, more specially where several persons may hold interest in the same subject-matter of different kinds or degrees," and later on in that section there is a direction that the information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the courts of judicature." This last mentioned direction leads us to think that the information which was directed in the earlier portion of the section to be collected was intended to be utilised in the courts of justice in determining the rights of litigants before them. It appears to us that in view of the wide language used in this section we cannot hold that the entries (to which we have referred) in the *khewats* and *khataunis* are not admissible in evidence in proof of the relations existing between the Skinner family and the plaintiffs. The officers exercising the powers conferred by the Regulation were directed to ascertain "the real nature and extent of the interests held, more specially where several persons may hold interests in the same subject-matter of different kinds or degrees." These words seem to us peculiarly applicable to the case of mortgagors and mortgagees whose interests in property are of different kinds or degrees. Therefore we think that the evidence afforded by these documents is good secondary evidence of the matters sought to be established in the case. Read in conjunction with section 35 of the Evidence Act, we think that the court below properly admitted them in evidence.

But the case does not rest on these entries alone. We have a *wajib-ul-arz* of the year 1303 *Fasli*, corresponding to the year 1896 A.D., inwhich the mortgage in question is mentioned. In that *wajib-ul-arz* in the paragraph which treats of the custom prevailing as to division of profits we find the following statement: "lands Nos. 9, 8, 7, 5 and 2 have since the 21st of April, 1817, been in the possession of Mr. Robert Skinner and others, the morgagees by virtue of a mortgage", and later on "the joint *mal* and *siwai* items in respect of the property held by a single proprietor are collected, by the single proprietor, in respect of the

1908

Robert Skinner v. Chandan Singh.

property held by co-sharers who are joint in food and business, by the head of the family, in respect of the mortgaged property, by the servant of Mr. Robert Skinner and others, the mortgagees, and in respect of the partitioned property by all the co-sharers." This *wajib-ul-arz* was duly attested on the 16th of June 1897. We may also refer to the *khewat* of the village of Tatarpur for the year 1303 *Fasli*. In that *khewat* we find members of the Skinner family described as sharers in the village and in the 6th column they are thus described "sons and daughters of Mr. Stewart Skinner *alias* Nawab Mirza, Europeans, residents of Meerut, mortgagees." Later on, opposite serial No. 5, Changa and Sumera, sons of Gulab Khazan, son of Lakhan, are described as "mortgagors to Mr. Robert Skinner *alias* Sardar Mirza and others, entered in *khata* No. 2 mortgagees." Now this *wajib-ul-arz* was prepared under the provisions of the Land Revenue Act of 1873, Act XIX of the year, and any entry contained in it would be *prima facie* evidence of its accuracy. Section 91 of that Act provides that "all entries on the record so made and attested shall be presumed to be true until the contrary is proved." Even therefore if the earlier *khewat* to which we have referred, were not good *prima facie* evidence of the mortgage in question, we think that the later *khewat* for the year 1896 would in the absence of evidence to the contrary, establish the fact that the Skinner family were mortgagees of the property in suit. We find similar entries in the closing *khewat* for the year 1310 *Fasli*, corresponding to the year 1903.

[Their Lordships then discussed the documents.]

Having regard to all this evidence we think that the decree of the court below was right and we therefore dismiss the appeal with costs, including fees in this court on the higher scale.

Appeal dismissed.

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Aikman, and Mr. Justice Griffin.

BHAWANI SINGH (DEFENDANT) *v.* DILAWAR KHAN, (PLAINTIFF.)*

Act (Local) No. II of 1901, *(Agra Tenancy Act), section* 201(3)—*Presumption—Suit for profits in Revenue Court—Question of title decided by Civil Court.*

In a suit for profits the defendants pleaded that the plaintiff had no title to certain plots. The Assistant Collector partially decreed the claim. The defendant thereafter and when an appeal was pending before the District Judge obtained a declaration of title to the plots from the Civil Courts. The lower Appellate Court held that without correction of the *khewat* the Civil Court's decree could not be given effect to in the Revenue Court.

Held that when as between parties to a revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. *Durga Shanker* v. *Gur Charan* (1) followed.

THE facts of this case are as follows:—

The respondent instituted a suit for profits. The appellant pleaded that the plots for which profits were claimed had been wrongly included in plaintiff's *patti.* The Assistant Collector without framing an issue as to title partly decreed the claim. The plaintiff filed an appeal against the portion of the claim dismissed and the defendant preferred objections under section 561 of the Code of Civil Procedure 1882. In the meantime the defendant sued the plaintiff in the Civil Court for a declaration of title to the plots in question and obtained a decree. The lower courts in spite of this decree of the Civil Court repelled the defendant's contention holding that until the defendants got the village records corrected profits must be calculated on the recorded shares in the khewat. The defendant appealed to the High Court.

The appeal was referred to the Full Bench on the recommendation of Richards and Griffin, JJ.

Munshi *Gulzari Lal,* for the appellant, argued that in view of the decision of the Civil Court the plaintiff was not a co-sharer

(1) Weekly Notes, 1905, p. 1.

1903

BHAWANI SINGH v. DILAWAR KHAN.

in the plots in dispute. The Assistant Collector was bound to decide the issue raised by the defendant. Whatever meaning might be attached to the words "shall presume" in section 201 of the Agra Tenancy Act, the point could not be raised here as the defendant had already gone to the Civil Court and got a decree in his favour. The last proviso to that section did not say that the suit in Civil Court was to be brought after the decision in the profits case became final. It could be brought at any time, and the defendant brought the suit immediately after the decision of the first court. He referred to section 40 of the Land Revenue Act.

Dr. *Tej Bahadur Sapru*, for the respondent, argued that the plaintiff's name was still recorded as co-sharer, and the Revenue Courts being courts of special jurisdiction could not ignore the entry in the Revenue registers. If they did many sorts of difficulties might arise. The mere fact that a decision in favour of the defendant was passed by a Civil Court did not give the Revenue Court power to ignore the entry unless the person who obtained the decree got the entry corrected. He referred to sections 32 (1), and 33 of the Land Revenue Act. If the record of rights was in plaintiff's favour he would be entitled to a decree. If the defendant could rely on the decision of the Civil Court the provisions of section 33, Land Revenue Act, would become useless, as it would not be necessary for him to file any application under that section. He further submitted that under clause 3 of section 201, the presumption was absolute in spite of the decree of the Civil Court. The difficulty which has arisen in this case would be obviated if the person obtaining the decree of a Civil Court took the trouble of getting the entry in the Revenue register corrected.

The following judgments were delivered:—

KNOX, J.—The plaintiff respondent in this second appeal claims to be co-sharer to the extent of one half share in a *patti* which consists of 5 biswas in mahal Alaidapur. Mahal Alaidapur consists of two *pattis*, one the *patti* just mentioned above, and the second a *patti* of 15 biswas.

...plaintiff's instituting the suit, out of which this appeal ...share of the profits which accrued due and payable

on account of the years 1309 to 1311 *Fasli*, the defendant, now appellant, pleaded *inter alia* that certain plots which originally formed part of the 15 biswa *patti*, had been wrongly included in the 5 biswa *patti*. If these plots were taken out, it would be found that the respondent was entitled to no profits in the years in dispute. The suit was instituted on the 11th day of April, 1905, in the court of the Assistant Collector. This officer without framing any issue upon the plea above mentioned, as raised by the appellant, gave the respondent on the 10th of May 1905, a decree but not for the full amount claimed by him for reasons with which I am not concerned in this appeal.

The plaintiff filed an appeal to recover the amount which had not been decreed and the defendant in a memorandum of objections again raised the plea already mentioned. On the 2nd of August 1905, the District Judge by an order passed under section 566 of the Code of Civil Procedure directed the Assistant Collector to try the issue raised in defendant's written statement and on the 24th of March 1906, he returned a finding to the effect that there was no evidence on the file that there had been any interchange of plots between the two *pattis*.

In the interval, the defendant had sought relief in the Civil Court, and had filed a suit for a declaration that the plots mentioned in his defence in the Revenue Court really belonged to the 15 biswa *patti*, and on the 19th of March 1906, he got the declaration he had asked for and promptly produced it before the Assistant Collector. That court in spite of this decree found as I have already said that there was no evidence.

The District Judge on the 28th of June 1906 accepted the finding of the Assistant Collector, and as regards the decree of the Civil Court, dated 19th March 1906, to which his attention was called, held that until the defendant had got the village records altered in terms of that decree, no effect could be given to it in a suit of this nature, and that the profits must be calculated on the recorded shares as they then stood according to the *khewat*.

The decision of the 19th March 1906, was finally upheld by this Court in Second Appeal on the 6th of May 1908.

1909

BHAWANI SINGH v. DILAWAR KHAN.

The defendant has in this Second Appeal which he filed on the 3rd of November 1906, again raised the question regarding the transfer of the plots and contended that the Revenue Courts should have read the entries in the village records subject to the Civil Court's decree.

It was at first thought that the decision of the question here raised turned upon the interpretation which should be put upon clause (3) of section 201 of Local Act No. II of 1901. That clause has been differently interpreted by learned Judges of this Court—see *Dil Kunwar* v. *Udai Ram and others* (1), *Dhanka* v. *Umrao Singh* (2), and *Banwari Lal and another* v. *Niadar* (3). But in my opinion whichever of these two interpretations be put upon clause (3) of section 201, it matters little so far as this appeal is concerned. Before the Assistant Collector made his return to the District Judge on the 24th of March 1906, he had before him in Court and on the file of the record the judgment *inter partes* of a Court of competent jurisdiction to the effect that the plaintiff had no proprietary right to the plots mentioned in the written statement of the defendant.

The concluding words of section 201 of the Local Act No. II of 1901 in clear terms reserves the right of any person to establish by suit in the Civil Court that the plaintiff who has instituted a suit under the provisions of Chapter XI of Act No. II of 1901 (and the plaintiff in the case was so suing) had not the proprietary rights he claimed to have, at any rate in the whole as he claimed it.

We have already in the case of *Durga Shanker* v. *Gur Charan and another* (4) held "that when as between parties to the revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff, who claims profits, the Revenue Court is not competent to ignore that decision."

For these reasons I would reverse the decree of the District Judge on this preliminary point and remand the case under order XLI, rule 23, with directions to re-admit the appeal under its original number in the register and to proceed to determine it on its merits. Under the circumstances costs should abide the result.

(1) (1906) I. L. R., 29 All., 148.
(2) (1907) I. L. R., 30 All., 53.
(3) (1907) I. L. R., 29 All., 158.
(4) Weekly Notes 1906, p. 1.

1909

BHAWANI SINGH v. DILAWAR KHAN.

AIKMAN, J.—I concur in the judgment of my learned colleague and in the order proposed by him and have nothing to add.

GRIFFIN, J.—I also concur.

BY THE COURT.—The decree of the District Judge on the preliminary point is reversed and the case remanded under order XLI, rule 23 of the Code of Civil Procedure (Act V of 1908) with directions to re-admit the appeal under its original number in the register and to proceed to determine it on the merits. Costs will abide the result.

Appeal decreed and cause remanded.

Before Mr. Justice Sir George Knox, Mr. Justice Aikman and Mr. Justice Griffin.

1909
January 14

GOBINDI (PLAINTIFF) v. SAHEB RAM AND ANOTHER (DEFENDANTS). *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 201 *(3)—Presumption—Question of title decided by Civil Court—Subsequent suit for profits by recorded co-sharers.*

When a Civil Court of competent jurisdiction has decided a claim to property, and this has been followed by a wrong entry in the revenue papers, *held* that in a subsequent suit for profits the claim must be in proportion to the share obtained under the Civil Court decree and no presumption arises under section 201 of the Agra Tenancy Act.

THE facts of this case are as follows :—

The plaintiff in 1901 obtained certain shares in immovable property under a decree of the Munsif of Hathras. She applied for entry of her name in the revenue papers but owing to some error her name was recorded in respect of a larger share than she had obtained under the decree. She sued the defendants for profits calculated on the share as entered in the Revenue papers. The defendants pleaded that the plaintiff was entitled to profits in proportion to the share decreed in her favour and not as entered in the *khewat*. The Court of first instance decreed the claim for profits in her favour in proportion to her recorded share. The lower appellate Court (Additional Judge of Aligarh) modified the decree holding that the plaintiff was entitled to profits proportionate to the share she had got under the Civil Court decree. The plaintiffs appealed to the High Court.

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* Second Appeal No. 912 of 1907, from a decree of Khetter Mohan Ghosh, Additional Judge of Aligarh, dated the 8th of June 1907, reversing a decree of G. Flowers, Assistant Collector 1st Class, of Aligarh, dated the 21st of November, 1906.

1909

GOBINDI
v.
SAHEB RAM.

The appeal was referred to the Full Bench on the recommendation of RICHARDS and GRIFFIN, JJ.

Dr. *Satish Chandra Banerji*, for the appellant, submitted that the plaintiff's name was entered in respect of a half share by a competent Revenue Court after a consideration of the decree of the Civil Court and the objections preferred by the present defendants. The latter submitted to the order of the Assistant Collector, which became final. That order could not now be treated as a nullity, and the Revenue Court under section 201 (3), Agra Tenancy Act, was bound to give effect to the mutation of names carried out in pursuance of that order.

Section 201, Tenancy Act, provides for two classes of cases, namely, (1) where the name of the plaintiff is not recorded and (2) where the name is recorded in the Revenue papers. Where, the plaintiff's name has already been put upon the record by the Revenue Court, in a subsequent suit before the same court, it is not called upon to embark upon a further enquiry, but is entitled to act upon the entry as conclusive for its purposes. Sections 44 and 57 of the Land Revenue Act show that there is a rebuttable presumption in favour of the truth of entries in Revenue papers, and if the legislature intended no higher presumption than that provided for in those sections, it was not necessary to enact section 201 (3), Tenancy Act. The words "shall presume" were not terms of art or technical words known to the common law of England or elsewhere. Taylor, for instance, in part I, Chapter V, of his *Law of Evidence*, had not used that expression though he had classified presumptions of law as conclusive and disputable. The expression "shall presume" had not been defined in the Tenancy Act or the General Clauses Act. There was a definition in the Indian Evidence Act, but as that Act was not *in pari materia* with the Tenancy Act there was no warrant for interpolating that definition into the Tenancy Act. The intention of the legislature being clear should be given effect to, as the words used were capable of bearing the meaning which the legislature intended and there was nothing in the context or the scheme of the Tenancy Act which compelled the Court to defeat the obvious intention of the legislature by putting a restricted meaning upon the words used.

See *Budge* v. *Andrews* (1), *Umachurn* v. *Ajadannissa*, (2) *Q.-E.* v. *Hori* (3). Where the legislature had intended only a rebuttable presumption in the Tenancy or the Land Revenue Acts, it had been careful to qualify the words "shall presume" by other words like "*until the contrary is shown*" [*section 35, 108 (2), Act II of 1901*]. In section 9 of that Act the words "conclusive proof" had been used, but the entry in that case was conclusive for all courts and no right of civil suit in favour of any party had been reserved. The plaintiff who had succeeded in getting his name recorded in Revenue registers should not be placed in a worse position than one who had failed to do so, as he clearly would be if the Revenue Court had power to determine the question of title adversely to him and he had no right to obtain an adjudication from the Civil Court. The object of the legislature was that Revenue officers should prepare the record of rights with care and abide by the same, and it was only if they did so that multiplicity of actions could be prevented.

He referred to *Dil Kunwar* v. *Udai Ram* (4), *Banwari Lal* v. *Niadar* (5), *Dhanka* v. *Umrao Singh* (6), *Niaz Ali* v. *Govind Ram* (7), *Bachan Singh* v. *Karan Singh* (8).

Munshi *Gulzari Lal*, for the respondents, submitted that there was a clear decree of the Civil Court deciding that the plaintiff was entitled to a definite share. This decree had become final and should be given effect to. Sections 199, 201, 202, Tenancy Act, show that the policy of the legislature was that questions of title were to be decided by the Civil Court and that decision was to bind the Revenue Court. Why should the parties here be referred again to the Civil Court? He submitted that the legislature did not mean a conclusive presumption by the words "shall presume" in section 201, Tenancy Act. Wherever the legislature meant a conclusive presumption, it used words like "conclusive evidence." He referred to Criminal Procedure Code (Act No. V of 1898), section 7; Land Acquisition Act (I of 1894), section 6; and the Criminal Tribes Registration Act (XXVII of 1871), section 6. In no other Act the words

(1) (1878) L. R., 3 C. P. D., 51, 521.
(2) (1885) I. L. R., 12 Calc., 430.
(3) (1899) I. L. R., 21 All., 391, 396.
(4) (1906) I. L. R., 29 All., 148.
(5) (1905) I. L. R., 29 All., 158.
(6) (1907) 4 A. L. J. R., 166; s. c. on appeal, I. L. R., 30 All., 58.
(7) Weekly Notes, for 1908, p. 157n.
(8) (1908) 5 A. L. J. R., 495

1909

GOBINDI
v.
SAHEB RAM.

"shall presume" have been used to mean a conclusive presumption. The argument based upon the proviso to section 201, was not sound, because the right of suit was given not to the defendant alone but to any person. The provisions of section 199 had not been made applicable to section 201(3), but if the plaintiff had the title it could not be taken away by an order of the Revenue Court. The Revenue Court did not sometimes correct an erroneous *khewat* even if moved to do so.

If the policy of the Act is not clear, the words "shall presume" should be interpreted in the sense in which they are ordinarily understood by lawyers in India. He referred to Maxwell, *Interpretation of Statutes*, p. 51; S. A., No. 358 of 1907 decided by Knox and Aikman, JJ., on May 27, 1908, *Dil Kunwar* v. *Udai Ram*, and *Dhanka* v. *Umrao Singh*.

Dr. *Satish Chandra Banerji* heard in reply.

The following judgments were delivered:

KNOX, J.—The facts out of which this appeal arises are as follows:—

The appellant Musammat Gobindi was plaintiff in the court of first instance. She brought the suit out of which this appeal has arisen to recover Rs. 397, principal and interest, on account of profits for the years 1310, 1311 and 1312 Fasli. She alleged that her share in the village Lahra was half, and that the defendants respondents owned the other half. The respondents replied that she had not correctly given the extent of her share, that under an arbitration award which had been made a decree of court, 73 bighas 3 biswas were given to her out of 89 bighas, 2 biswas, half of a 3 biswas *haqiat* in *khata khewat* No. 6 of mauza Lahra. Other matters were also urged in reply. But we are not concerned with those at present. The court of first instance held that the appellant's share was half 3 biswas as recorded in the *khewat*, refused to go behind the recorded share, and decreed profits in her favour in proportion to this recorded share. The lower appellate court refused to accept the entry in the *khewat*, held that it was an incorrect entry, that the appellant owned only 73 bighas 3 biswas of land, and that on this footing was entitled to no profits. It accordingly set aside the decree of the lower court and dismissed the plaintiff's suit. In appeal before us it has

been urged that as the appellant is a recorded co-sharer of half of 3 biswa share, she is under section 201, clause (3) of the Tenancy Act of 1901, entitled to a decree for the full amount claimed by her, that the court below could not go into the question as to whether the plaintiff's proprietary title was to be restricted to a lesser area than that recorded in the *khewat*. On this case coming before this court, it was at first thought that the decision of the questions raised in the appeal turned upon the interpretation to be put upon clause (3), section 201, of the Local Act No. II of 1901, and as that clause had been differently interpreted by learned Judges in this court in *Dil Kunwar* v. *Udai Ram* (1), *Banwari Lal* v. *Niadar* (2), and *Dhanka* v. *Umrao Singh* (3), the learned Chief Justice directed that the appeal should be laid before a Full Bench of this Court.

In view however of the fact that the extent of the proprietary rights of the appellant has been the subject of a decision by a Civil Court of competent jurisdiction, it seems to me that we need not in this case consider and that we ought not to consider the interpetation to be placed upon clause (3), section 201, of Act No. II of 1901. I refer to the decree passed by the Munsif of Hathras on the 8th of October 1901, in the suit brought by Musammat Gobindi against Saheb Ram and Birj Narain. That suit was referred to arbitration, and on the 8th of October 1901, the award was made a decree of court—and out of 89 bighas, 2 biswas, *i.e.* half of a 3 biswas *haqiat, khata khewat* No. 6 of mauza Lahra, now in dispute, 73 bighas 3 biswas were given to Musammat Gobindi and 15 biswas odd to Birj Narain. It was further added in the decree that Musammat Gobindi must pay Government revenue for the full half share of 89 bighas 2 biswas. This was followed upon the 19th of October 1901, by an application presented by Musammat Gobindi to the Revenue Court, for the entry of her name over 73 bighas 3 biswas *haqiat* out of 89 bighas 2 biswas of *khata khewat* No. 6 of mauza Lahra. The Tahsildar who made an inquiry recommended to the subdivisional officer that Musammat Gobindi's name should be entered as prayed for by her. The Assistant Collector acting upon this report on the 18th of

(1) (1903) I. L. R. 29 All. 148. (2) (1903) I. L. R. 29 All, 153.
(3) (1907) I. L. R. 30 All, 58.

1909

GOBINDI v. SAHEB RAM.

November 1902, passed an order to the effect that Musammat Gobindi's name be entered in the *khewat* as recommended by the Tahsildar. Owing to some error, however, Musammat Gobindi's name was entered in respect of 89 bighas odd. It has thus been established by suit in Civil Court that Musammat Gobindi has only proprietary right over 73 bighas 3 biswas and not over half share in *khata khewat* No. 6 of mauza Lahia. Owing to this decision of the Civil Court which was long prior to the date on which the present suit was instituted out of which this appeal arises, there is nothing left for the court to presume. The view taken by the lower appellate court is a correct view and in my opinion this appeal should be dismissed with costs.

AIKMAN, J.—I concur in the judgment of my learned colleague and have nothing to add.

GRIFFIN, J.—I also concur.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

1909
January 14

Before Mr Justice Aikman.

JAGAN NATH PRASAD, (DECREE-HOLDER) *v.* MULCHAND AND OTHERS (JUDGMENT-DEBTORS).*

Act No. VII of 1870 (Court Fees Act), section 5—Reference—Schedule I, Articles 4 and 5—Court fee—Interlocutory order—Review of.

Held that an application for review of an interlocutory order was properly stamped with a court fee stamp of Rs. 2 and that neither Article 4 nor Article 5 of schedule I of the Court Fees Act refers to an interlocutory order. *Bom. Printed Judgments*, 1892, p. 383 followed.

THIS was a reference by the Taxing officer to the Taxing Judge under section 5 of the Court Fees Act.

An application for review of an order passed by a Division Bench under section 566, Code of Civil Procedure, 1882, was presented on a court fee stamp of Rs. 2. The Stamp Reporter reported that the application was insufficiently stamped on the ground that the application being one for review of judgment should have been stamped under schedule I, article 4 of the Court Fees Act, and the proper fee was the fee leviable on the memorandum of appeal.

* Stamp Reference in Second Appeal No. 1143 of 1907.

The vakil for the applicant objecting to the report of the Stamp Reporter the case was referred to the Taxing Officer under section 5 of the Court Fees Act for decision. He made the following reference to the Taxing Judge on November 12th, 1908:—

"The application is for the review of an order remanding a case under the provisions of section 566 of the Code of Civil Procedure. The office report is to the effect that the fee as laid down by article 4, schedule I of the Court Fees Act, is payable. There is no question that the application was filed after the ninetieth day from the date of the High Court's order.

"The learned vakil contends that this article does not apply as the application refers to *an order* and not to a *judgment ending in a decree*.

"I would refer to the heading of chapter XLVII of the Code of Civil Procedure where the expression "Review of judgment" is used. Further I would point out that while the words decree or order are used in section 623, the word judgment is used in article 4 of the 1st schedule to the Court Fees Act. I think it is clear that this article applies to the review of all judgments under section 623, whether the judgments of which review is sought is of the nature of an order, or ends in a decree. I know of no rule by which the term judgment is limited to mean a *judgment which ends in a decree*.

"The learned vakil also argues that should his first contention be overruled, then article 5 of the 1st schedule and not article 4, is the proper article under which to levy the fee. In support of this contention he advances no argument and I think it is untenable.

"Lastly, he argues that as the review assails only part of the order, only a proportionate fee should be levied. He has omitted to show what this proportion should be, and as far as I can judge from reading the application for review it would be impossible to do so. Another case in which a question similar to this has arisen is at present before the Honourable Taxing Judge for decision: therefore I direct this to be also laid before him."

On 23rd November 1908, the Taxing Officer made the following further reference:—

"I find I was under a misapprehension when I made my note as to the applicability of articles 4 and 5 of the 1st schedule.

1909

JAGAN NATH PRASAD v. MULCHAND

I would add that if the days spent in obtaining a copy be excluded the application for review was filed before the ninetieth day from the date of the judgment. But this does not assist the argument of the learned vakil as in *In re Kota* reported in I. L. R., 9 Mad., 134, and in *In the matter of Doorga Prosunno Ghose*, reported in 9 Calc., L. R., p. 479, the view taken is dead against his contention. I therefore think that the full fee is leviable."

Lala Girdhari Lal, for the appellant.

AIKMAN, J.—This is a reference by the Taxing Officer, under section 5 of the Court Fees Act. In Execution Second Appeal No 1143 of 1907 a Bench of this Court referred certain issues for trial by the court below. An application was presented by the appellant in that case for a review of the interlocutory order referring these issues. The application was presented on a court-fee stamp of Rs. 2. The official charged with the duty of checking the court-fee reported that the application was insufficiently stamped on the ground that the proper court-fee on the application was the fee leviable on the memorandum of appeal. The Taxing Officer accepted this view, but considering the question to be one of general importance, made a reference regarding it under section 5. It is no doubt true that the application is an application for a review of judgment and that judgment is defined as meaning the statement given by the judge of the grounds of a decree or order. But in my opinion neither article 4 nor article 5 of schedule I of the Court Fees Act refers to an interlocutory order. I think it is clear from the language of these articles that they deal with judgments ending in a decree. I am of opinion therefore that the application was properly stamped. The learned vakil for the applicant has referred me to a case in the Bombay High Court in which a similar view was expressed by the learned Chief Justice on reference under section 5 of the Court Fees Act. This is to be found at p. 383 of the Printed judgments of the Bombay High Court for 1892. I concur with the view there taken. This is my answer to the reference.

Before Mr. Justice Aikman.

1909. January 14.

BAJI LAL (APPELLANT) *v.* GOBARDHAN SINGH AND OTHERS (RESPONDENTS.)*

Act No. VII of 1870 (Court Fees Act), section 5—Section 7, clause IX—Reference—Court fee—Foreclosure suit—Plaintiff ordered to discharge prior mortgage—Validity of mortgage challenged in appeal—Ad valorem fee.

In a suit for foreclosure a decree was passed in favour of the plaintiff conditionally on his redeeming a prior mortgage on payment of Rs. 5,914-6-5. The plaintiff appealed assailing the validity of the prior mortgage and stamped his memorandum of appeal with an *ad valorem* court fee on the amount of the principal sum of money secured by the prior mortgage. *Held* that the proper amount of court fee payable was an *ad valorem* court fee on the amount which the plaintiff had been ordered to pay to the prior mortgagee. *Nepal Rai* v. *Debi Prasad* (1) and *Jhanda Mal* v. *Himmat* (2) followed

THIS was a reference under section 5 of the Court Fees Act by the Taxing officer to the Taxing Judge. A memorandum of appeal having been presented for stamp report the Stamp Reporter made the following report :—

This is an appeal against the decree dated the 13th July 1908, passed upon a review of judgment on the application of Ganga Baksh Singh a respondent. The sole question in this appeal is as to whether the plaintiff appellant is liable to pay the amount found due under the deed, dated the 15th July 1892, namely, Rs 5,941-6-5. This being so according to the ruling in *Nepal Rai* v. *Debi Prasad* (1) this appeal should be valued at the last mentioned amount and a fee of Rs. 315 paid on the same. Rupees 61-8-0 having been paid, there is therefore a deficiency of Rs. 253-8 to be made good by the plaintiff appellant on this memorandum of appeal. Relief prayed for is stated.

Munshi *Gulzari Lal*, for the appellant, took exception to the above report as below:

" In the above case the office report is to the effect that there is a deficiency of court fee to the extent of Rs. 253-8-0 due from the appellant on the memorandum of appeal filed in this Hon'ble Court. I beg to submit that the report overlooks the fact that the first two grounds of appeal question the validity of the mortgage which the appellant has been ordered to redeem and the sole question is not as to the amount to be paid for redemption. The

*Stamp Reference in review of judgment in first appeal No. 201 of 1901.

(1) Weekly Notes, 1905, p. 10.

(2) Unreported judgment of Burkitt, J., dated 15th January 1903.

1909

BAJI LAL v. GOBARDHAN SINGH.

ruling in Weekly Notes, 1905, page 40, has no application as the grounds raised in that case were only concerned with a portion of the sum payable for redemption and there was no question as to right of redemption. Here the appellant as puisne mortgagee questions both his liability to redeem as well as the amount he has to pay for redemption. The principle applicable is that applied to pre-emption cases and laid down in I. L. R., 6 All., 488, which by analogy would apply to redemption cases as well. Under section 7, clause ix, of the Court Fees Act, the principal amount secured by a mortgage is the sum on which court fee is to be calculated. Court fee can be calculated on the amount of the mortgage money payable for redemption only when there is no question as to the right or liability to redeem. Please see I. L. R., 13, All., 94; I. L. R., 27, All., 559."

The stamp reporter again put up the following report:—

"The learned vakil for the plaintiff appellant objects to the correctness of the office report. I beg to refer the case under section 5 of Act VII of 1870, for the decision of the Taxing Officer.

"The facts so far as they are material for the purposes of this reference are as follows:—

"The plaintiff Bajilal who is appellant here brought the suit which gave rise to this appeal in the Court of the *Subordinate Judge* of Cawnpore for foreclosure under a mortgage, dated the 10th November, 1894, executed by Gobardhan Singh in his favour in lieu of Rs 1,300. He alleged further that at the time of the mortgage he had been given to understand that the property mortgaged to him was free from incumbrances; that he subsequently found that the mortgagor had executed a mortgage-deed in respect of some of the properties in dispute in favour of one Mora Singh for Rs. 138; that the latter sold it to Ganga Baksh Singh; that the mortgage-deed complained of was a fictitious transaction, and that no consideration passed for the same. The defendant Ganga Baksh Singh contested the suit on the ground that the mortgage held by him was real and that the plaintiff was bound to pay him Rs. 10,753-15-2 on that account. On the trial of the suit the court below found that the mortgage held by Ganga Baksh Singh was real. As to the amount

the parties stated that a sum of Rs. 2,357-1-6 was due thereunder. The court below passed a decree in plaintiff's favour for foreclosure of the property other than that covered by Ganga Baksh Singh's mortgage and as regards the latter it ordered that the plaintiff on paying Rs. 2,357-1-6 to Ganga Baksh Singh would be entitled to take by foreclosure the properties covered by both his and Ganga Baksh's mortgage. Later on, Ganga Bakhsh Singh applied to the court below under section 623, Civil Procedure Code, for review of judgment as regards the amount due under his mortgage and the court granting the review amended its judgment and awarded to Ganga Bakhsh Singh Rs. 5, 941-6-5 instead of Rs. 2,357-1-6. The plaintiff now appeals to this Honourable Court as regards the mortgage, dated the 15th July, 1892, held by Ganga Baksh Singh. Having regard to the grounds taken in this Court it seems to me that the sole object of the plaintiff is to get a decree for foreclosure of the entire property mortgaged to him free from the liability imposed by the decree appealed against on paying the mortgage money due on Ganga Baksh Singh's mortgage.

"The case in *Bhawani Prasad* v. *Kutub-un-nisa Bibi* (1), cited by the appellant has absolutely no bearing on the present case. That was a case as to future interest the amount whereof was not known at the time the appeal was filed and their Lordships held that a fee of Rs. 10 was sufficient under article 17, clause vi. The cases of *Hafiz Ahmad v. Sobha Ram* (2) and *Pirbhu Narain Singh v. Sita Ram* (3) do not also apply, the former was a pre-emption case and the latter has been dissented from by the Allahabad and Madras Courts. The objection of the plaintiff appellant might have some force, had the question at issue in the appeal related to the validity or otherwise of the mortgage sued upon. But that is not the case here. The prior mortgagee says "my mortgage is real, let me have my money and you may foreclose the property mortgaged to me as well." The Court allows this plea and directs the plaintiff to pay up the amount due on the prior mortgage and he gets a decree for foreclosure on his mortgage. I submit that the law laid down in *Nepal Rai* v. *Deb*

(1) [1905] I. L. R., 27 All., 559. (2) [1884] I. L. R., 6 All. 483.
(3) [1890] I. L. R. 13 All., 94.

1909

BAJI LAL
v.
GOBARDHAN SINGH

Prasad (1) applies here. The *ratio decidendi* in that case was that where in an appeal in a case like the present, the value of the subject-matter in dispute, was ascertainable, section 7, clause ix, of the Act did not apply and an *ad valorem* court fee was chargeable on the memorandum of appeal. Now, in the present case the plaintiff appellant has been ordered to pay Rs. 5,941-6-5 to Ganga Baksh Singh on account of the prior mortgage as a condition precedent to the plaintiff's getting a decree for foreclosure of the entire property mortgaged. The plaintiff wants to avoid the payment of this sum, no matter on what ground. That being so, I submit that *ad valorem* fee should be paid on the memorandum of appeal. Lastly, if the analogy of the case in *Hafiz Ahmad* v. *Sobha Ram* (2) cited by the plaintiff appellant is applicable to this case, then the appellant should pay court fee on the principal amount of the mortgage sued upon, *viz.*, on Rs. 1,300, and not on the principal amount of another mortgage, the validity of which he impeaches.

Note :

"I beg to submit for your consideration the decision of the Honourable Taxing Judge in (i) Jhandu Mal's case and (ii) F.A. 22 of 1907, which though not on all fours with the present case may throw some light on the point involved in the present reference."

The Taxing Officer made the following reference to the Taxing Judge:—

For the decision of the point of taxing law arising in this case it is unnecessary for me to go into the facts further than to mention that the appellant sued for foreclosure of a mortgage. He was granted his decree subject to his paying off a prior mortgagee. The sum he was ordered to pay amounts to Rs. 5,941-6-5. In the first instance this sum was fixed at Rs. 2,357-1-6. But on review of judgment it was increased to the larger sum. In the appeal the validity of the prior mortgage is assailed. Grounds of appeal 5, 6 and 7 also raise question as to the amount payable should the mortgage be deemed valid. The reply of the learned counsel for the appellant also shows that he is attacking the decree of the lower appellate court on both these points.

(1) Weekly Note, 1905, p. 40. (2) (1884) I. L. R., 6 All., 488.

There have been several decisions on questions similar to the present one, but, in the present case the question presents itself in a somewhat different form. It is clearly settled by the decision in *Nepal Rai* v. *Debi Prasad and others* (1) that where the question in appeal merely refers to the amount which a mortgagee in a suit for foreclosure has to pay before he can be permitted to foreclose, the appeal must be stamped *ad valorem* with reference to this amount. On the other hand, if the appeal only raises the question of the validity of the mortgage and does not go on to contest the correctness of the sum found to be due under the impugned mortgage by the lower court in case the High Court held the mortgage to be valid, *i. e.*, if the appellant has only one string instead of two to his bow, it would appear from the reasoning in *Pirbhu Narain* v. *Sita Ram* (2) that the stamp should be calculated on the principal money covered by the mortgage. Thirdly if the appellant both impugns the mortgage and is prepared, if he is defeated on that point, also to contest the correctness of the amount ordered to be paid, the question arises, whether he is to pay court fees calculated on the amount decreed by the lower court or on the amount secured by the mortgage. As far as I am aware there is no decision directly dealing with the question. In *Hafiz Ahmad* v. *Sobha Ram* (3) it was held that "where an appeal is preferred in a suit for pre-emption on the ground that the right to pre-empt has or has not been established as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as in terms provided in article vi of section 7 of the Act. But when the question in appeal relates solely to the amount to be paid by the pre-emptor, then we think it should be calculated *ad valorem* etc." If the analogy of this decision be applied to the present case, it would appear that the court fee should be calculated as laid down in section 7, article ix, of the Act. But I would point out that the result of that would be that an appellant by inserting in his memorandum of appeal a ground as to the validity of the mortgage, which possibly he might seriously intend to press, would get his appeal on a

(1) Weekly Notes, 1905, p. 40. (2) (1890) I. L. R., 13 All., 94.
(3) (1884) I. L. R., 6 All., 488.

1909

Baji Lal v. Gobardhan Singh.

lower court fee than he would had he confined himself to impugning the correctness of the amount found due under the mortgage. There is, however, yet another consideration which, if I correctly understand the law laid down, affect all three cases put above and that is whether the provisions of section 7, article ix, can be applied to appeals at all. With regard to this I would refer to third paragraph of the ruling in the case of *Nepal Rai* v. *Debi Prasad* (1). The language of this paragraph, especially the words "This section is confined to a suit apparently, and not to any appeal" seem to me to exclude all appeals from the scope of the section, and the words immediately following those quoted appear to lay down that the provisions of the first schedule apply in all cases, or at any rate in all cases of the nature now under consideration. Therefore even an appeal in which the validity of the mortgage was the sole ground, would have to be stamped on the sum found *ad valorem* due under the mortgage and *a fortiori* an appeal such as the present one in which the amount due is also in question. As the point is an important one, I have the honour to refer it for decision. I would add that I am not quite clear how far the appellant is prepared to contest the correctness of the sum found due by the lower court. But from the 5th and 6th grounds of the memorandum it may be gathered that he will only ask that this sum be reduced from Rs. 5,941-6-5 to Rs. 2,357-1-6. In that case the *ad valorem* fee would be calculated on the difference between these two sums.

The following order was passed by

AIKMAN, J.—The appellant Baji Lal sued to foreclose a mortgage. As a condition precedent to foreclosure, the court below held that the appellant was bound to redeem a prior mortgage by payment of a sum of Rs. 5,941-6-5. Baji Lal has appealed against this portion of the decree and the office reported that the memorandum of appeal should bear an *ad valorem* fee on this amount. The Taxing Officer took the same view, but has referred the case under section 5. It is not easy to reconcile all the decisions cited but in my opinion the later decisions support the view taken by the office. That view is in accord with the *ratio decidendi* in *Nepal Rai* v. *Debi Prasad* (1).

(1) Weekly Notes, 1905, p. 40.

In a reference under section 5 in *Jhandu Mal* v. *Himmat*, second appeal of 1907, from the decree of the Additional Judge of Meerut, the learned Judge who disposed of the reference said :—The appellant plaintiff seeks by this appeal to get rid of a liability imposed on him by the decree under appeal to pay off Kalyan's prior mortgage as a condition precedent to bringing the mortgaged property to sale" and he held that the appellant must pay an *ad valorem* court-fee. I am unable to distinguish the principle therein laid down from that involved in the present case. My answer to the reference is that the office report is correct.

I allow the appellant one month within which to pay the deficient court-fee.

APPELLATE CIVIL.

1903
January 14

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

GHULAM HUSAIN AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD HUSAIN (PLAINTIFF) AND MUHAMMAD WALI AND OTHERS (DEFENDANTS.)*

Act No. I of 1877 (Specific Relief Act). section 42—Suit for possession before expiry of lease—Declaratory decree—No alteration in the nature of the suit.

During the subsistence of a tenancy a third party dispossessed the plaintiff's tenants. The plaintiff sued the third party for possession. *Held* that the suit for immediate possession was not maintainable in consequence of the existence of the outstanding lease. *Held* that the plaintiff in such a case was entitled to a declaration of title and this does not alter the nature of the suit. *Sita Ram* v. *Ram Lal* (1) followed.

THE facts of this case are as follows :—

The plaintiff's tenants were dispossessed by defendant No. 1 and four others from a house. Thereupon the plaintiff instituted this suit for possession of the house. The defendants contended that as the house had been let out on a lease for a year which had not expired, the plaintiff was not entitled to immediate possession. The Court of first instance (Munsif of East Budaun) dismissed the suit sustaining the defendants' plea. On appeal (District Judge of Shahjahanpur) the Munsif's judgment was reversed. The defendant appealed to the High Court.

Dr. *Tej Bahadur Sapru* (for whom Munshi *Iswar Saran*) for the appellants, contended that the plaintiff could not succeed in

* First Appeal No. 103 of 1903 from an order of C. W. Steel, District Judge of Shahjahanpur, dated the 9th of July 1903.

(1) (1896) I. L. R., 18 All., 440.

1909

GHULAM HUSAIN v. MUHAMMAD HUSAIN.

a suit for possession as he was not entitled to immediate possession at the time he brought the suit. The lease had not expired at the time when the suit was instituted. He cited *Gulzar Singh* v. *Kalyan Chand* (1), *Davis* v. *Kazee Abdool Hamed* (2), *Ramanadan Chetti* v. *Pulikutti Servai* (3), *Sita Ram* v. *Ram Lal* (4), *Jagannatha Charry* v. *Rama Rayer* (5).

Mr. *Abdool Raoof*, for the respondents, submitted that the plaintiff was entitled to maintain the suit. The ruling in *Gulzar Singh* v. *Kalyan Chand*, was not an authority on the point. Even if the plaintiff was not entitled to obtain possession, he had surely a right to a declaration of title under section 42 of the Specific Relief Act to protect his interest. He cited *Salima Bibi* v. *Sheikh Muhammad* (6), *Ramanadan* v. *Pulikutti Servai*, (3).

Munshi *Iswar Saran*, in reply submitted that if a declaratory decree be granted, it would change the nature of the suit.

KNOX and GRIFFIN, JJ.—The subject-matter in dispute in this appeal is a house situated in Budaun. The plaintiff sued for possession but in his plaint added a further prayer that any other relief to which he might be entitled be granted to him. One of the defences and the only one with which we are now concerned, was that as the plaintiff's mother acting for him had granted a lease to certain third persons, the plaintiff could not sue for immediate possession inasmuch as the lease was a lease for one year and this period had not determined at the time when the suit was brought. The Court of first instance sustained this plea but in appeal the District Judge held that the plaintiff was entitled to claim immediate possession. He accordingly reversed the order of the Munsif and remanded the case for determination on the merits under section 562 of the former Code of Civil Procedure. The defendants who were in actual possession have come to this Court and again raise the plea that upon the plaintiff's own showing his suit for immediate possession can not succeed as the term of the lease had not expired at the date of suit.

(1) (1893) I. L. R., 15 All., 399.
(2) (1867) 8. W. R., 55.
(3) (1898) I. L. R., 21 Mad., 288.
(4) (1896) I. L. R., 18 All., 440.
(5) (1901) I. L. R., 26 Mad., 238.
(6) (1895) I. L. R., 18 All., 131.

The learned vakil for the appellants relied upon *C. T. Davis* v. *Kazee Abdool Hamed* (1), *Ramanadan Chetti* v. *Pullikutti Servai* (2). We think that this prayer is so far entitled to prevail that the plaintiff's suit at the time he brought it, so far as it related to immediate possession, was not maintainable in consequence of the existence at the time of the outstanding lease in favour of Nazir Khan and Amin Khan. It is true that in the case of *Ramanadan Chetti* v. *Pullikutti Servai* (2) the Court refused to grant a declaration in plaintiff's favour, but that was in consequence of the special circumstances of that case. This Court in the case of *Sita Ram* v. *Ram Lal* (3) while upholding a plea that the plaintiff was not entitled to possession, so long as there was a tenant entitled to possession held further that the landlord in such a case had a right to a declaration under section 42 of the Specific Relief Act. The learned vakil for the appellants contends that even this relief could not be given inasmuch as it would alter the nature of the suit. We do not agree with this. We allow the appeal so far as to amend the order of the District Judge into an order under Order XLI, Rule 23 of the present Code of Civil Procedure. Under that Rule we direct the case be remanded, that issues Nos. 1 and 2, as fixed in court of first instance, be tried in the case now remanded and that the court proceed to determine the suit; the evidence recorded during the original trial shall, subject to all just exceptions, be evidence in the case after remand. If the Court find these issues in the plaintiff's favour he should be granted a declaratory decree under section 42 of the Specific Relief Act. The costs of this appeal will follow the event.

Appeal decreed and cause remanded.

(1) (1867) 8 W. R., 55. (2) (1898) I. L. R., 21 Mad., 288.
(3) (1896) I. L. R., 18 All., 440.

1909
January 16.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

DARIA (DEFENDANT) v. HARKHIAL AND ANOTHER (PLAINTIFFS.)*

Pre-emption—Village divided into several mahals—Rights of pre-emption given to co-sharers in the village—Right among co-sharers of thoks.

The *wajib-ul-arz* of a village gave a right of pre-emption to share-holders in a *patti*, then to those in a *mahal* and lastly, to those in the village. The village was divided into several *thoks*. One of the *thoks*, *viz.* Jaroli was subsequently sub-divided into several *mahals* and under the new arrangement the *thoks* were done away with. A share was sold in the *thok* so sub-divided and was purchased by a co-sharer in one of the old *thoks*. A co-sharer in one of the *mahals* of *thok* Jaroli sued for pre-emption. *Held* that the vendee being a co-sharer in the village the plaintiff had no preferential right of pre-emption inasmuch as the old *pattis* and *thoks* had been done away with. *Dalganjan Singh* v. *Kalka Singh* (1), distinguished.

THE facts of this case are as follows:—

Mauza Basawar consisted of several *thoks*, one of which was *thok* Jaroli. *Thok* Jaroli had several *pattis*. The plaintiff, the vendor, and the vendee were all co-sharers in *thok* Jaroli, but not in the same *patti*. The *wajib-ul-arz* of village as it stood in 1283 fasli, contained the following provisions as to pre-emption:—

"*Dawa haq shaffa ka dar surat intiqal haqiat kisi hissedar ke bazarie bai wa rehn: awal Bhai Bhatija haqiqi aur doem phir Bhai Bhatija chachazad shurkayan haqiat aur seom phir hissedar patti aur chdharam phir hissedar thok aur panchwen phir malikan deh ka hoga; aur jo malikan deh se koi na lewe to usko akhtiar hoga jiske hath chahey rehn wa bai kari.*"

In 1305 *thok* Jaroli was perfectly partitioned into several *mahals*, one of which was *mahal Harkhial* and *Dalipa*. By this new arrangement the pre-empted property and the property of the plaintiff fell in *mahal Harkhial* and *Dalipa* and that of the vendee in another *mahal*, known as *mahal Chandarsen*. The new system did away with the *pattis*. No new *wajib-ul-arz* was prepared after the partition. The plaintiff brought this suit of pre-emption on the plea that he was a co-sharer with the vendor in the same mahal, whereas the vendee was a stranger to it. The defence was that the plaintiff had no preferential right to pre-empt. Both the lower courts

* Appeal No. 64 of 1908, under section 10 of the Letters Patent.

(1) (1899) I. L. R. 22, All., 1.

allowed this contention relying on *Gobind Ram* v. *Masih-ul-lah Khan* (1) and dismissed the plaintiff's suit. On appeal to the High Court, GRIFFIN, J., reversed the decree of the courts below holding that the principle enunciated in *Dalganjan Singh* and *Kalka Singh* (2) applied to the present case.

The defendant appealed.

Babu *Jogindra Nath Mukerji*, for the appellant.

Babu *Benode Behari*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for pre-emption. The village in question formerly consisted of several *thoks*, one of which was *thok* Jaroli. *Thok* Jaroli consisted of several *pattis*. The property in dispute was situate in *patti* Khera of *thok* Jaroli. In this *thok* the plaintiff was a co-sharer. The *wajib-ul-arz* of the village gave a right of pre-emption to five classes of pre emptors. With the first two classes we are not concerned. The third class consists of share-holders in a *patti*, the fourth, sharers in a *thok*, and the fifth share-holders in the village. In the year 1305 Fasli *thok* Jaroli was by perfect partition divided into several *mahals* one of which is *mahal* Harkhial and Dalipa. By the new arrangement the property sought to be pre-empted and the property of the plaintiff fell in *mahal* Harkhial and Dalipa. The defendant appellant is not a co-sharer in *mahal* Harkhial and Dalipa but is the owner of *mahal* Chanderson, one of the *mahals* of the old *thok* Jaroli. It thus appears that by the new arrangement *pattis* and *thoks* have been done away with and the old *thok* Jaroli has been divided into several new *mahals*. Both the lower Courts held that in view of the new arrangement the plaintiff had no preferential right of pre-emption over the defendant appellant. On appeal the learned Judge of this Court, before whom the appeal was heard, came to the conclusion that the case was governed by the ruling in the case of *Dalganjan* v. *Kalka Singh* (2). We are unable to agree in the view taken by the learned Judge. It appears to us that when the *pattis* and *thoks* into which the village was divided were done away with, the plaintiff could only claim pre-emption by virtue of his being a shareholder in the village. The defendant vendee is also a share-holder in the

(1) (1899) I. L. R., 23 All., 1. (2) (1907) I. L. R. 29 All., 295

1909

DARIA v. HARKHIAL.

village and the plaintiff has no preferential right over the defendant. If there had been a new *wajib-ul-arz* provision might have been made whereby preference would under the circumstances be given to the plaintiff, but in this case no new *wajib-ul-arz* was prepared. Therefore the rights of the parties are governed by the old *wajib-ul-arz* and in view of the fact that the old *pattis* and *thoks* have been done away with, we fail to see how the plaintiff has any preferential right of pre-emption over the defendant vendee. For these reasons we allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court. We give the defendant appellant the costs of this appeal.

Appeal decreed.

1909
January 20.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SHEO KARAN SINGH AND ANOTHER (DEFENDANTS), v. MAHARAJA PARBHU NARAIN SINGH (PLAINTIFF.)*

Landlord and tenant—Possession without a lease—Kabuliat—Suit for rent—Liability for compensation for use and occupation—Denial of liability—Estoppel.

When certain persons entered into possession of property executing a regis- [illegible]

[illegible]

possession they could not be heard to say that they were not liable for use and occupation.

THIS was a suit for arrears of rent on the basis of a registered *kabuliat* executed by the defendants. By the *kabuliat*, an annual rent of Rs. 4,701 was reserved for the landlord and the term of the lease was nine years. The defendants were let into possession of the property. No lease was executed by the plaintiff. In the written statement which the defendants filed they admitted that rent had been paid for some time, but they raised the question that a mere *kabuliat* without a lease did not constitute a contract. The court below decreed the suit. The defendants appe [illegible]

* First Appeal [illegible] Collector 1st class of [illegible]

Babu *Lalit Mohan Banerji* (for whom Babu *Surendra Nath Sen*) for the appellant, contended that a *kabuliat* was the counterpart of a lease and since there was no lease in the present case there could be no counterpart. A *kabuliat* showed only a unilateral intention to be bound by the terms of a contract embodied in a lease. It was merely the agreement of a tenant to accept the tenancy and not the agreement of a landlord to lease the land. He relied on *Nand Lal* v. *Hanuman Das* (1), *Kashi Gir* v. *Jogendro Nath Ghose* (2), *Beni* v. *Puran* (3), *Sikandar* v. *Bahadur* (4), *Turof Sahib* v *Esuf Sahib* (5).

In a suit for rent where an alternative relief for compensation had not been claimed no damages for use could be awarded. *Rachhea Singh* v. *Upendra Chandra Singh* (6). A valid transfer could only be created by a registered instrument—in this case a lease—and where a document ought to be in writing and registered, oral evidence was not admissible. *Somu Gurukhal* v. *Rangammal* (7).

The Hon'ble Pandit *Sundar Lal* (with whom Munshi *Gokul Prasad*), for the respondents, submitted that the execution of a lease was not the only way of creating a tenancy. A tenancy was created as soon as rent was paid and it was admitted in this case that rents had been paid for some time. Where there was an obligation, evidenced by a registered document, in return for use of land, it could be enforced. The tenancy was created by payment of rent and the document was an evidence of the terms of the tenancy.

STANLEY, C.J., BANERJI AND AIKMAN, JJ.—In the suit out of which this appeal has arisen His Highness the Maharaja of Benares sued for arrears of rent, relying on a *kabuliat*, dated the 7th of December 1899, executed by the defendants and registered on the 8th of December 1899. By the *kabuliat* the rent reserved for the holding was an annual sum of Rs. 4,701 and the term of the lease was nine years. The defendants were let into possession of the property on the faith of the *kabuliat*. No lease was executed by the plaintiff. In the plaint the plaintiff sets

(1) (1904) I. L. R., 26 All., 358.
(2) (1904) I. L. R., 27 All., 13?.
(3) (1904) I. L. R., 27 All., 190.
(4) (1905) 2 A. L. J. R., 208.
(5) (1907) I. L. R., 30 Mad., 322.
(6) (1899) I. L. R., 27 Calc., 239
(7) (1871) 7 M. H. C. R., 13.

1909

SHEO KARAN SINGH v. MAHARAJA PARDHU NARAIN SINGH.

out the terms of the *kabuliat* and says that in accordance with the agreement entered into thereunder the sum which he claimed was due. The defendants in their written statement did not deny that a tenancy subsisted between them and the plaintiff, but they raised various objections to portions of the claim. In a supplementary written statement, however, they pleaded this defence, namely that "a mere *kabuliat* without there being a lease is not sufficient to constitute a contract. Hence the suit, merely on the basis of the *kabuliat*, is improper and not correct." We are not clear as to the meaning of this difference but we take it from the argument which has been addressed to us that the defendants contend that by reason of the fact that a *patta* or lease was not executed by the plaintiff, he cannot recover any rent in respect of the use and occupation of his land by the defendants. The Court below held that the defendants executed the *kabuliat* in favour of the plaintiff and had it registered and that they came in possession under it and that consequently the execution of the lease was not necessary in order to entitle the plaintiff to maintain the suit. We think that the claim of the plaintiff may be treated as one for compensation for the use and occupation of the land and in view of the fact that the defendants entered into and have continued in occupation of the land, with the plaintiff's consent, they undertaking to pay rent therefor, they cannot be heard now to say that they are not liable for rent for use and occupation. They certainly cannot be treated as trespassers and it is admitted that they heretofore have paid rent to the plaintiff in respect of their occupation of the land in question. It is not their case that they are trespassers. Under these circumstances we fail to discover on what ground they can resist the plaintiff's claim to recover compensation for the use and occupation of his land.

Then the question arises as to the measure of compensation. We have the means of determining that by reference to the *kabuliat* which was executed by the defendants in favour of the plaintiff. They agreed to pay the rent claimed. This rent the Court below has allowed, we think rightly.

The only ground of appeal which has been pressed in argument before us is the first, namely that a *kabuliat* without a

1909

SHEO KARAN SINGH v. MAHARAJA PARBHU NARAIN SINGH

patta does not create a valid lease of immoveable property. As to this we express no opinion inasmuch as we find that under the circumstances the plaintiff is clearly entitled to recover compensation for use and occupation.

In view of the fact that the defendants have been in occupation of the land with the consent of the plaintiff, and of the fact that the rent was fixed by the *kabuliat* which has been given in evidence, we think there is no force in the first ground of appeal. The learned vakil for the appellants has abandoned the the second, third and fourth grounds of appeal. We therefore dismiss the appeal but we think that having regard to the fact that the plaintiff has neglected to take the precaution of executing, in favour of his lessees, a proper lease, he is not entitled to any consideration in the matter of costs. We therefore allow no costs to either party.

We express no opinion as to the correctness of the rulings which were relied upon by the learned vakil for the appellants, namely in the cases of *Nand Lal* v *Hanuman Das* (1), *Kashir Gir* v. *Jogendro Nath Ghose* (2), *Beni* v. *Puran Dass* (3), and *Turof Sahib* v. *Esuf Sahib* (4).

Appeal dismissed.

APPELLATE CIVIL.

1909. *January* 22.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

CHHAKAURI KHAN (PLAINTIFF) v PIR BAKHSH KHAN AND ANOTHER, (DEFENDANTS).*

Act (Local) No. III of 1901 (Land Revenue Act), sections 39, 210, 211—Act (Local) No. II of 1901 (Agra Tenancy Act), section 159—Code of Civil Procedure (Act XIV of 1882) section 310A—Appeal—Jurisdiction.

Two decrees were obtained in the Revenue Court, one was for costs resulting in proceedings under section 39 of the Land Revenue Act, and the other was passed under section 159 of the Agra Tenancy Act. The decrees were consolidated and one sale was held on account of both of them. The judgment-debtor applied to the Assistant Collector, offering to pay in the sum decreed under section 310A of the Code of Civil Procedure, 1882. The application was rejected by the Assistant Collector, and the auction-purchaser obtained formal possession over the

*First Appeal No. 110 of 1907 from an order of Srish Chandra Bose, District Judge of Ghazipur, dated the 5th of September 1907.

(1) (1901) I. L. R., 23 All., 393.
(2) (1901) I. L. R., 27 All., 133.
(3) (1904) I. L. R., 27 All., 190.
(4) (1907) I. L. R., 30 Mad., 322.

1909

CHHAKAURI KHAN v. PIR BAKHSH KHAN.

house sold. On appeal by the judgment-debtor the Collector set aside the order of the Assistant Collector and extended the time for payment. The money was paid in and the sale set aside. The Board of Revenue rejected the application for revision made by the auction-purchaser, who thereupon brought a suit for confirmation of the sale in the Civil Court.

Held, that whether the sale was held under Act No. III of 1901 in which case appeals from orders passed in execution would lie to the Collector, Commissioner and the Board of Revenue under sections 210 and 211, or the order passed on the application under section 310A was one passed under Act No II of 1901, the Civil Courts had no jurisdiction to entertain any question relating to it. Whether or not an appeal lay to the Collector from the orders of the Assistant Collector, the Board undoubtedly had the power of revision.

THE facts of this case are fully set out in the judgment of their lordships.

Babu *Sital Prasad Ghosh*, for the appellant.

Munshi *Govind Prasad*, for the respondents.

KNOX AND GRIFFIN, JJ.—This appeal has been brought by Chhakauri Khan who purchased at a sale in execution of two Revenue Court decrees the house of the judgment-debtor defendant. One decree was for costs resulting in proceedings under section 39 of Act No. III of 1901. The other was a decree passed under Act II of 1901, section 159. Apparently the two decrees were consolidated and one sale held on account of both decrees so consolidated.

The judgment-debtor applied to the Assistant Collector offering to pay in the sum decreed in accordance with the provisions of section 310A of the Code of Civil Procedure as made applicable to Rent Courts. The Assistant Collector of the second class rejected his application and there is no doubt that he did so wrongly. Chhakauri Khan then got a sale certificate in his favour and obtained formal possession over the house on the 5th November 1905.

The judgment-debtor appealed to the Collector who set aside the order of the Court below and granted the judgment-debtor ten days further within which to pay the decree money together with the penalty. The money was paid in within ten days, and the sale set aside. The present appellant then applied to the Board of Revenue for revision of the Collector's order and his application was dismissed. He then instituted the suit out of which this appeal has arisen. In it he asks that the decision

of the Collector and that of the Board of Revenue above mentioned be set aside as being *ultra vires* and contrary to law and that a declaration may be given in his favour for maintenance of possession over the house purchased. The Court of first instance held that section 310A applied to the case, that the Assistant Collector had jurisdiction to entertain the application and although he decided it wrongly and in such a way as to result in a substantial injustice to the judgment-debtor no appeal lay from that order. He took the view that the orders of the Collector and the Board of Revenue were *ultra vires*, that the sale having been confirmed by the Assistant Collector, and his order being final, Chhakauri Khan was entitled to possession. The lower appellate Court took the view that the order of the Assistant Collector under section 310A was appealable and setting aside the decree of the Munsif remanded the case under section 562 for trial on the merits.

In appeal before us it is contended that section 310A of the Code of Civil Procedure does not apply to the sale inasmuch as it was held in joint execution of two decrees, one passed under Act No. II of 1901 and the other under Act No. III of 1901.

The learned vakil for the appellant allowed that the section might apply in execution of a decree passed under Act No. II of 1901, but this being a sale " in joint execution of two decrees," one under Act No. II of 1901 and the other under Act No III of 1901 it could not be said under which of the two Acts the sale was held.

We do not think we need enter into the question under which of the two Acts the sale was held. If it were held under Act No. III of 1901 the appeals from orders passed in execution would lie to the Collector, Commissioner and the Board of Revenue (*vide* sections 210, 211 of Act No. III of 1901), and the orders passed by the Collector and the Board of Revenue would be clearly within their jurisdiction. If, on the other hand, the order passed on the application under section 310A was an order passed under Act No. II of 1901 it appears to us that the Civil Court would have no jurisdiction to entertain any question relating to it. Whether or not an appeal lay to the Collector from the order passed by the Assistant Collector, the Board

1909

CHHAKAURI KHAN v. PIR BAKHSH KHAN.

undoubtedly had the power of revision. The appellant did apply to the Board and got from the Board of Revenue the order of which he complains. With that order the Civil Court is forbidden to interfere under section 167 of Act No. II of 1901.

This is certainly a matter in which the Board of Revenue could take cognizance of the disputes between the parties and no Court other than the Court of Revenue could take cognizance. The appeal fails and is dismissed with costs.

Appeal dismissed.

1909
January 23.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Karamat Husain.

HARI SINGH AND OTHERS (PLAINTIFFS) v. SHER SINGH AND ANOTHER (DEFENDANTS.)*

Code of Civil Procedure (Act No. XIV of 1882), section 317—when applicable—Purchase made by a member of joint Hindu family—Plea that purchase was made on behalf of family.

When property is purchased at a Court sale in the name of one of the members of a Hindu family which is alleged to be a joint family and it is alleged that the purchase was made on behalf of the family, *held* that section 317 of the Code of Civil Procedure 1882, has no application to such a case. The object of section 317 is to check *benami* purchases.

THE facts of this case are fully set out in the judgment of their lordships.

The Hon'ble Pandit *Sunder Lal* and Pandit *Moti Lal Nehru* for appellants.

Dr. *Tej Bahadur Sapru*, Munshi *Gokul Prasad* and Babu *Surendra Nath Sen* for respondents.

STANLEY, C.J., and KARAMAT HUSAIN, J.—The suit out of which this appeal has arisen was brought by the plaintiffs appellants for possession of a house. The plaintiffs impleaded in the suit two brothers, namely Sher Singh and Partab Singh, claiming title to the house under a sale-deed executed on the 28th of April 1896, by Sher Singh alone purporting to act on behalf of himself and Partab Singh. Partab Singh filed a defence to the effect that he alone was the owner of the house under a purchase made by him and that he did not authorise his brother Sher Singh to execute the sale-deed in favour of the plaintiffs on his behalf. The suit was

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* Second Appeal No. 1433 of 1907 from a decree of W. F. Kirton, Additional Judge of Moradabad, dated the 18th of July 1907 confirming a decree of Mata Prasad, Subordinate Judge of Moradabad, dated the 21st of November 1899.

dismissed in the Court of first instance, whereupon an appeal was filed but during the pendency of the appeal Partab Singh died childless, leaving a widow, namely the defendant respondent Musammat Misri. Musammat Misri was not brought upon the record within the period of six months allowed by law for that purpose and after the expiration of this period she applied to the learned Additional Judge, before whom the appeal was pending for an order declaring that the appeal had abated. This application was made on the 15th of August 1901. The answer to her application was that Sher Singh and Partab Singh formed a joint family and there was no necessity, in view of this fact, to bring Musammat Misri on the record, inasmuch as any interest which Partab Singh had, survived to his brother Sher Singh. Upon this application an order was passed on the 30th of September 1901, the particulars of which it is unnecessary at length to state. Suffice it to say the Court remanded the case to the Court of first instance with directions to that Court to take fresh evidence under sections 569 and 570 of the Code of Civil Procedure, Act XIV of 1882. Before this order was complied with the plaintiffs and Sher Singh agreed to refer their disputes to arbitration and these disputes were accordingly so referred and an award has been passed. Musammat Misri, the widow of Partab Singh was no party to this reference and is therefore clearly not bound by it. An award was made according to which the plaintiffs' claim for recovery of the house in dispute was allowed. Musammat Misri then came forward and applied that the award should be declared not to be binding upon her and that the suit should be disposed of. The award was then set aside on the 14th of December 1905. The case then came up for hearing on the 6th of February 1905, when Sher Singh without consulting Musammat Misri, refused to put in any evidence and ultimately the appeal was dismissed for want of prosecution. Then on appeal to the High Court the appeal was restored and directed to be heard on its merits and accordingly came before the learned Additional Judge from whose decision this appeal has been preferred.

Upon the important question in the case as to whether the house in dispute was owned by Partab Singh alone or by him and

1903

HARI SINGH
v.
SHEO SINGH.

Sher Singh jointly, the learned Judge came to the conclusion that it was unnecessary to determine this question in view of the provisions of section 317 of the Code of Civil Procedure. In his judgment he says:—"It appears that as long ago as the year 1879 the property in question was sold in execution of a judgment-debt against the father of Partab Singh and Sher Singh and was bought in by Sheo Dayal in the name of Partab Singh, this Sheo Dayal Singh being the father-in-law of Partab Singh. Now under section 317, Civil Procedure Code, it was not open to Partab Singh's own father to question his title, nor did he or any one else ever do so, and I think it is useless for the present plaintiffs, therefore, to try and argue that the property was really joint family property." In this the learned Additional Judge was clearly in error. Section 317 of the Code has no application to a case of the kind. The object of that section was to check *benami* purchases. In this case the purchase was made by one member of a Hindu family which is alleged to have been a joint family, and the question which the Court ought to have decided was whether or not that purchase was made by Partab Singh as member of a joint Hindu family for himself or for himself and Sher Singh, the other member of the family. We cannot therefore decide this appeal without referring an issue to the lower appellate Court for determination and that issue is whether the house in dispute was purchased by Partab Singh for himself alone or for himself and for Sher Singh as members of a joint Hindu family. If it was purchased by him for himself and his brother, and the property was therefore joint family property, Musammat Misri was not a necessary party to the suit. We therefore refer this issue to the lower appellate Court under order 41, rule 25 of Act No. V of 1908 and we direct the Court to take such relevant evidence as the parties may adduce. On return of its finding we allow the parties the usual ten days for filing objection.

Cause remanded.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

1909
January 28.

GOPI NATH SINGH (DECREE-HOLDER) *v.* HARDEO SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Act No. IX of 1908, (Limitation Act), section 2)—Appropriation by creditor of payment towards interest—Interest not paid as such—Money paid found by Court to be paid as interest.

Under the terms of a mortgage bond executed in 1884 any payments made thereunder was to be applied first in payment of interest and next in payment of principal. The debtor paid several sums from time to time from 1887 to 1899. A suit for sale was instituted in 1902 and decreed. The mortgaged property being insufficient to discharge the mortgage an application was filed by the decree-holder for a decree under section 90 of the Transfer of Property Act. *Held* that having regard to the terms of the bond and the finding of the court that payments were appropriated on account of interest, it might be rightly inferred that payments were made on account of interest as such and that the application for a decree under section 90, Act No. IV of 1882 was not barred by limitation. *Hanmant mal* v. *Rambabai* (1), *Narrunji* v. *Mugniram* (2), and *Surju Prasad* v. *Khwahish Ali* (3) distinguished.

THE facts of this case are that on August 28, 1902, Gopinath Singh, the appellant, instituted against the respondents a suit for sale on foot of a mortgage executed by the father of the defendants on March 21, 1884. The deed provided that any payment made under it was first to be applied to the payment of compound interest, next to payment of simple interest, and lastly to the payment of principal. Payments were made from time to time and except one payment in the year 1887 no payment was marked as being made on account of interest. The mortgagee, however, claimed to have appropriated them towards payment of interest. The mortgagee obtained a decree for sale and sold the mortgaged premises. The sale proceeds being insufficient to satisfy his claim he applied for a decree under section 90 of Act No. IV, 1882. The defendants objected to the application on the ground that the plaintiff's suit not having been instituted within six years from the execution of the deed was time barred. The Subordinate Judge of Meerut disallowed the application holding that the payments were not made towards interest and appropriation of payment by creditor could not give fresh

* First Appeal No. 51 of 1908 from a decree of H. David, Subordinate Judge of Meerut, dated the 1st June 1907.

(1) (1879) I. L. R., 3 Bom., 198. (2) (1880) I. L. R., 6 Bom., 103
(3) (1882) I. L. R., 4 All., 512.

1909

GOPI NATH SINGH v. HARDEO SINGH.

starting point for limitation under section 20 of the Indian Limitation Act. The decree-holder appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant, contended that a creditor had, in the absence of any direction of the debtor to the contrary, a discretion to appropriate any payment towards interest under section 60 of the Contract Act. Such appropriation was sufficient for the purposes of section 20 of Act IX of 1908, to save limitation. Section 20 of Act IX of 1908 was not inconsistent with section 60 of Act IX of 1872, that both the sections read together established the proposition that an appropriation by a creditor of any payment towards interest could save time. He relied on *Nirpat* v. *Shadi* (1).

The Hon'ble Pandit *Sundar Lal*, for the respondent, submitted that an indication of the will of the debtor that the payment was made towards interest was essential for the purposes of the Limitation Act to extend time. The Contract Act provided for the exercise of discretion by both the payer and the payee as to appropriation of payments, but the Limitation Act section 20, confined itself strictly to the discretion of the payer. To extend time under section 20 of the Limitation Act it was necessary that the debtor should intimate that he was making the payment toward interest as such. He cited *Damodar Ramchander Bapat* v. *Bai Jankibai* (2), *Hanmantmal Motichand* v. *Rambabai* (3), *Narrunji Bhimji and others* v. *Mugniram Chandaji* (4), *Surju Prasad Singh* v. *Khwahish Ali* (5), *Subraya Kamati* v. *Pakaya bin Narayan* (6).

Dr. *Tej Bahadur Sapru*, in reply. For the purposes of section 20 of the Limitation Act intimation of intension on the part of the debtor as to the payment of interest as such was not necessary. He relied on a passage at page 748 of Mittra's Law of Limitation and Prescription. He further submitted that the Contract Act was an earlier Act, while the Limitation Act was a later one. If the Legislature had meant anything to contradict the earlier Act there would have been an express provision as to that in the later.

(1) Weekly Notes, 1881, p. 19.
(2) (1903) 5 Bom., L. R., 850.
(3) (1879) I. L. R., 3 Bom., 198
(4) (1880) I. L. R., 6 Bom., 103.
(5) (1884) I. L. R., 4 All., 512.
(6) (1904) 4 Bom., L. R., 231.

1909

GOPI NATH SINGH v. HARDEO SINGH.

KNOX and GRIFFIN, JJ.—This first appeal arises out of an application made by one Chaudhari Gopinath, decree-holder. The application is under section 90 of the Transfer of Property Act asking for a decree under that section and for sale of certain property of Dalip Singh and others, judgment-debtors.

Among other objections raised by the judgment-debtors was an objection to the effect that the claim to this decree was barred inasmuch as the suit was filed when more than six years had expired after the execution of the bond. The bond was dated 21st of March 1884, the suit brought upon it was instituted on the 28th of August 1902. Several payments had been made from time to time, but the judgment-debtors objected that these payments were not payments made towards interest "as such." The Subordinate Judge who tried the suit held that these payments should be considered payments appropriated by the judgment-creditor towards interest due under the bond. The lower Court in considering the application for execution was of opinion that (1) mere appropriation by the creditor of any amount paid towards interest, or (2) any direction of a Court that sums paid be appropriated under the provisions of the Contract Act, sections 59, 60 and 61, towards interest could not be interpreted as payments made by the debtor towards interest "as such" and (3) that the suit brought by Chaudhri Gopinath having been filed when more than six years had expired from the execution of the bond, held that the present application for a decree under section 90 of the Transfer of Property Act could not be granted and dismissed the decree-holder's application. The decree-holder comes here in appeal and contends that under the circumstances of the case the payments made by the judgment-debtor must be held to be payments coming within section 20 of the Limitation Act, namely, payments of interest on debt paid "as such" before the expiration of the prescribed period by the person liable to pay the debt.

The bond in suit was, as already stated, executed on the 21st March 1884, and there has been a series of payments made under it nearly every year from the year 1887 up to the year 1899. With the exception of the very first payment, namely, that on the 26th March 1887, not one of these payments is

1909

GOPI NATH SINGH v. HARDEO SINGH.

marked as being made on account of interest. The payment of 1887 is set out as a payment of Rs. 600 on account of interest.

We find on looking into the bond that there is an express provision in it that any payment made under it was first to be applied to the payment of compound interest, next to the payment of simple interest, and lastly to the payment of principal.

In view of this we hold that at the time the parties entered into the bond they did so under circumstances which implied that payment was to be applied to the discharge, first of the particular debt of interest and afterwards to the discharge of the debt of principal.

Next there is the circumstance that the first payment made under the bond was distinctly ear-marked as a payment towards interest, so far coinciding with what we have just held to be the intention of the parties when they entered into the bond.

Then it is not entirely without significance that all the subsequent payments made and endorsed upon the bond without any difference from the first payment with the solitary exception that the "words on account of interest" are wanting. From these circumstances we may safely assume, we think, that the parties intended and understood that the payments were to be and had been made by the debtor as payments on account of interest and that they should have been appropriated by the creditor as payments on account of interest. We also find that in the original suit the Court considered that the payments were on account of interest.

The learned advocate for the judgment-debtors contended that as there was no direction by the judgment-debtors as to how the money was to be appropriated, and as no appropriation was made then and there in the case of any of the payments with the exception of that made on the 26th March 1857, none of these payments could rightly be held to be payments of interest on debt paid as such and none would save limitation from running. In support of his contention he referred us to the case of *Hanmantmal Moti Chand* v. *Rambabai* (1), *Narrunji Bhimji* v. *Mugnirum Chandaji* (2), *Surju Prasad Singh* v. *Khwahish Ali* (3)

(1) [1879] I. L. R., 3 Bom., 198. (2) [1880] I. L. R., 6 Bom., 103.
(3) [1882] I. L. R., 4 All., 512.

In the first of these cases the judgment of the learned Judges of the Bombay High Court starts with the words "It is clear, on the plaintiffs own statement, that there has been no payment of interest as such."

The second case was one of an undefended suit brought upon a running account between plaintiffs who were merchants of Bombay and the defendant who was a trader. There was nothing in the case to show that there had been any payments on the parts of the defendant as interest. In the third case the learned Judges who decided that case say that there was nothing to show that payments were made towards interest as such. In this respect they are all distinct from the present case.

In the course of the argument we were referred to the case of *Damodar Ramchander Bapat* v. *Bai Jankibai* (1). Mr. Justice TYABJI who decided the case held that the question whether sums paid by the judgment-debtor were or were not paid as interest on a debt was a question of fact. He accordingly examined the evidence and found that whether he looked into the nature of the payment itself or the nature of the endorsement, he felt great difficulty in coming to the conclusion that the payments made were payments of interest as such. We agree with the learned Judge that the question is a question of fact in each case and in the present case as we have already pointed out we come to the conclusion from (*a*) the very particular words set out in the bond between the parties, (*b*) the terms in which the first payment was recorded on the bond, (*c*) the record of subsequent payments on the bond, that there is evidence from which it can be rightly inferred that in the present case the payments made by the judgment-debtors were intended to be and were payments of interest as such.

We think that the learned Subordinate Judge was wrong in holding that the *application before him was barred by limitation* inasmuch as the payments made bring the case down to the year 1899, and well within the period of limitation. We allow the appeal, set aside the decree of the Court below and in accordance with Order 41, Rule 23, direct the case to go back to the lower court with directions to re-admit it in its original number in the

(1) [1903] 5 Bom., L. R. 550.

1908

GOPI NATH SINGH v. HARDEO SINGH.

register of applications and to proceed to determine it according to law. Costs of this appeal to be costs in the case and to follow the event. Fees in this Court will include fees on the higher scale.

Appeal decreed.

APPELLATE CRIMINAL.

1909
January 30.

Before Mr. Justice Griffin.

EMPEROR *v.* JAMNA.*

Penal Code (Act XLV of 1860), section 304A—Administering poison believing it to be a charm—Rash and negligent act—Liability.

Where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious and mixed it with his food believing that by doing so she would become rich. *Held* that her conduct was wanting in that prudence and circumspection which every human being is supposed to exercise, and as by her rash and thoughtless act she caused death she was guilty of an offence under section 304A., Indian Penal Code. *Emperor* v. *Nagawa* (1) distinguished. *Q.-E.* v. *Bhakhan* (2), followed.

The facts of this case are as follows:—

The accused was a poor relative of one Lal Singh and lived near his house. On the 25th March 1908, Lal Singh's household became ill after taking food, and four of them died on the next day. The accused was suspected of having administered poison and made a confession that she had received a powder from an enemy of Lal Singh who had told her that if she administered it to Lal Singh she would become rich and Lal Singh would become poor. She mixed that powder with Lal Singh's food. She retracted this confession, but the court below believed it and convicted her under section 304A, Indian Penal Code, and sentenced her to two years' rigorous imprisonment. The prisoner appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant, contended that on the findings of fact arrived at by the learned Sessions Judge there was no case against the accused either under section 304 or 304A. The accused did not know the nature of the substance which she mixed up with the flour. That being so there

* Criminal Appeal No. 1031 of 1908 from an order of H. J. Bell, Sessions Judge of Aligarh, dated the 17th September 1908.

(1) (1902) 4 Bom., L. R., 425. (2) (1887) P. R., 60.

was no intention to cause death or hurt and there was no rash or negligent act. He relied on *Emperor* v. *Nagwa* (1).

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown, submitted that the Bombay case was no doubt in favour of the appellants' contention, but the Punjab Chief Court has consistently maintained the contrary view. He cited *Q.-E.* v. *Musammat Bhakhan* (2), *Q.-E.* v. *Khema* (3), *Q.-E.* v. *Musammat Sultan* (4). He asked the Court to accept the Punjab view.

GRIFFIN, J.—Musammat Jamna has been convicted of an offence under section 304A of the Indian Penal Code and has been sentenced to two years' rigorous imprisonment. She appeals against her conviction. The learned vakil, who appears for her, has taken me through all the material evidence in the case. His contention is that the evidence on which the conviction mainly rests and the confession of the accused are not sufficient to warrant the conviction. The case has been tried by the learned Sessions Judge of Aligarh with extreme thoroughness and care. His judgment contains an accurate summary of all the evidence in the case, and in it every aspect of the case has been fully considered. On the 25th of March last some food was prepared at the house of one Lal Singh Brahman of village Mahugua. A number of people of Lal Singh's household partook of the food on that and the following day with the result that four persons died and several others became seriously ill. The report of the chemical examiner shows that arsenic was detected in the viscera sent for examination and also in a portion of the food. It is clear then that poison was administered in the food prepared in Lal Singh's house on the 25th March last. It is clear that the poison must have been introduced into the food by some one who had access to the place where the food was prepared. The learned Sessions Judge has shown, in my opinion, correctly that no one in the immediate household of Lal Singh can be suspected of any concern in this poisoning. The accused's own conduct in the course of the investigation directed suspicion towards her. On the 4th April she made a confession before

(1) (1904) 4 Bom., L. R., 125.
(2) (1887) P. R., 60.
(3) (1879) P. R., 8.
(4) (1884) P. R., 35.

1909

EMPEROR v. JAMNA.

the Magistrate in which she admitted that one Badri Prashad, who, to her knowledge, was an enemy of Lal Singh, had given her some white powder telling her to mix it in Lal Singh's food. She said that Badri Prashad told her that if she gave Lal Singh this stuff she would become wealthy and Lal Singh would become poor, and that Badri Prashad also added that if any harm did result, she ought not to mention it to any one. She took the white powder and taking advantage of the temporary absence of Musammat Kundania, who was cooking the food, she mixed the powder with the flour. This confession she afterwards retracted but it was corroborated in material particulars by the evidence of the accused's two daughters, both young girls, whose evidence has impressed the learned Sessions Judge very favourably. I agree with the court below that it is proved that Musammat Jamna did mix the powder with the flour. It is, however, not proved that she knew that the powder was arsenic or any other deleterous substance. The Court below has found her guilty of an offence under section 304A of the Indian Penal Code. It is contended on behalf of the appellant that even on the facts found Musammat Jamna has committed no offence punishable by law. I am referred to a decision—*Emperor* v. *Nagiwa* (1) in which the facts were that the accused administered arsenic to the deceased, her lover, in sweetmeat balls given to him to eat in the belief that it was a charm which would revive love for her, but she did not know that the substance was a deadly poison. In this case it was held that as the evidence did not establish the necessary guilty mind, the accused must be acquitted. The question whether the act of the accused in *that* case did not come under section 304A was not *considered*. There is a case much more in point, *Q.-E.* v. *Musammat Bhakhan* (2), in which the facts were that "the accused having an intrigue with a paramour, received poison from her paramour to administer to her husband as a charm, and administered it with the result that death ensued; that the death of the husband was caused by the substance administered to him, the substance being arsenic; but that the accused did not know the substance given to her to be noxious till she had seen its effect." It was *held in*

(1) (1902) I. L. R., 4 Bom., 425. (2) (1887) P. R., Cr. Judgment, 60

1909

EMPEROR v. JANKI.

that case that the offence committed by the accused was that punishable under section 304A of the Penal Code, her act not amounting to culpable homicide but being a rash act and having caused the death of her husband. It was further held in that case that "where the accused knew that the substance came from her paramour and was to operate on her husband as a charm it became her duty to ascertain that it was innocuous before she administered it to her husband and culpability was imputable for the absence of that caution and circumspection which ought to have been exercised in ordinary prudence under the circumstances stated." In my opinion the law has been correctly stated in the decision above quoted. Applying the law to the facts of the present case, the accused has in my opinion been properly convicted of an offence under section 304 A of the Indian Penal Code. She took the powder on her own admission from an acknowledged enemy of Lal Singh. She took no precaution whatever to ascertain whether it was noxious or not. Her conduct was wanting in that prudence or circumspection which every human being is supposed to exercise. By her rash and thoughtless act she has made herself responsible for the death of four persons. I dismiss her appeal.

Appeal dismissed.

REVISIONAL CRIMINAL.

1909
February 5.

Before Mr Justice Griffin.
EMPEROR v PANNA LAL.*

Act No. XII of 1896 (Excise Act), section 21—Sale—Not for profit.

P, who held no license under the Excise Act, obtained some methylated spirits from a shop for the secretary of the Jhansi Club, sent it from there to the club, but made no profit on the transaction: *Held* that the transaction did not amount to a sale within the meaning of section 21 of the Excise Act (XII of 1896).

THE material facts of the case appear from the judgment of the Court.

Mr. *C. Dillon* (with whom Babu *Sital Prasad Ghosh*) for the applicant

* ... order of H. E. Holme, Sessions ... S, confirming an order of J. H. ... September 1908.

1909

EMPEROR v. PANNA LAL.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

GRIFFIN, J.—This is an application for revision of an order of the Cantonment Magistrate of Jhansi convicting the applicant Panna Lal on two charges under the Excise Act, one under section 21 and the other under section 51.

The facts which form the basis of the first charge are that Panna Lal who holds no license under the Excise Act, had received an order from the secretary of the Jhansi Club, for some methylated spirits. Panna Lal obtained the methylated spirits from another shop and sent it from there on to the club, without making any profit in the transaction. Under the particular circumstances of the case it is difficult to call this transaction a sale. I therefore set aside the conviction and sentence under the first charge.

The second charge against the applicant, which was amply proved, was that he had purchased at a court sale a quantity of wines and spirits knowing that he had no license for possession or sale of such liquor. I am unable to interfere with the order on the second charge.

I allow the application to the extent above indicated and set aside the conviction and sentence under section 21 of the Excise Act. The fine of Rs. 30, if realized, will be refunded. The application is otherwise dismissed.

Order modified.

1909
February 6.

MISCELLANEOUS CIVIL.

Before Mr. Justice Aikman.

IN THE MATTER OF SHEIKH MAQBUL AHMAD (APPLICANT.)*

Act No. VII of 1870 *(Court-fees Act), Schedule* 1, *section* 5, *articles* 4, 6—*Court-fee—Application for review affecting only portion of decree.*

Held that the proper fee leviable on an application for review of judgment when it refers only to a portion of the decree is the fee leviable on the plaint or memorandum of appeal, in which the judgment, review of which is asked for, is passed—*Proceedings, Jan.* 16, 1872 (1), *In re Manohar Tamdekar* (2), not followed. *Nobin Chundra* v. *Uzir Ali* (3), and *Imdad Hasan* v. *Badri Prasad* (4), followed.

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* Stamp Reference in review of Judgment filed in first appeal No. 291 of 1901.

(1) (1872) 7. Mad., H. C. R, app. 1.
(2) (1879) I. L. R., 4, Bom., 26.
(3) (1899) 3 C. W. N., 291.
(4) Weekly Notes, 1898, 212.

THIS was a reference made by the Taxing officer to the Taxing Judge under section 5 of the Court Fees Act.

The plaintiff's suit was for possession of a 12 biswas zamindari share and demolition of buildings and mesne profits. The defendants pleaded that the plaintiff was only entitled to 11 biswas 17 biswansi 2 kachwansi and not to 12 biswas.

The plaintiff was really entitled to 11 biswas 7 biswansi 2 kachwansi, and the 17 biswansi mentioned was a clerical error. A decree was passed in favour of the plaintiff for 11 biswas 17 biswansi 2 kachwansi and also for damages. There was an appeal to the High Court against the decree as regards damages and other matters not material to the present report. The present application for Review of judgment as regards the mistake of 10 biswansi was presented to the Court and court fee was paid with reference to the valuation of the 10 biswansi share regarding which correction was prayed for. On the application being presented to the office for stamp report the Stamp Reporter made the following report:—

"This is an application for review of judgment in F. A. No. 291 of 1901, decided on the 10th of December 1903, as regards 10 biswansi share out of 12 biswas share in mauza Tilokpur, which is one of the villages claimed in that suit. The applicant has paid court fees on five times the Government Revenue of that share. I beg to submit that under article 4, schedule 1 of Act VII of 1870, the proper fee leviable on this application for review is the fee that was leviable on the memorandum of appeal, namely Rs. 1,015 (please see W. N., 1898, p. 213 and 3 C. W. N., 202), Rs. 21-12-0 having been paid, there is therefore a deficiency of Rs. 993-4-0 to be made good by the applicant."

The following objection was preferred to the office report by Maulvi *Ghulam Mujtaba* who appeared for the applicant:—

"I am afraid I cannot accept the correctness of the office report and it is necessary to state shortly the facts of the case.

The suit out of which the appeal arose was brought for the following reliefs:—

(*a*) Possession of the zamindari property and land occupied by factories valued at Rs. 26,545-0-9.

(*b*) Rs. 44,505-14-7 on account of damages for the demolition of certain buildings.

(*c*) Rs. 212-6-2 the amount of the Government Revenue paid by the plaintiff.

(*d*) Mesne profits valued at Rs. 3,675.

The principal defendant was Sheikh Ali Ahmad, who held the property claimed in relief (*a*) under a lease executed by Musammat Chunni Kuar, and the

1900

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

applicant for the Review of judgment was made party to the suit upon the ground that defendant No. 1 purchased a portion of a factory in Mauza Chalasni in his name (paragraph 18 of plaint) and also upon the ground that he was related to and was in collusion with defendant No. 1. It will thus appear that the suit embraced distinct subjects. The defence raised on behalf of the applicant for Review of judgment was that he had nothing to do with the property in dispute except as regards a portion of the factory (paragraph 33 of written statement) and fractional share in mauza Tilokpur (paragraph 37) one of the villages claimed in the suit, and he consequently pleaded that the suit was bad for misjoinder of causes of action and parties. The applicant's interest in the suit was limited to a share in factory and a share in Tilokpur. The plea of the applicant as regards the share in Tilokpur was practically admitted by the plaintiff.

The suit was decreed by the court of first instance in respect of *(a)* except as to a share in Tilokpur and *(b)* to the extent of Rs. 7,629 and was dismissed as to other reliefs and the question of mesne profits was reserved for the execution department. Reliefs *(a)* and *(b)* being decreed against all the defendants, an appeal was preferred by all of them and was valued at Rs. 33,874-0-9. The appeal again embraced distinct subjects *viz.*, reliefs *(a)* and *(b)* and by the [illegible]

which the applicant had nothing to do.

The present application for Review is limited to a 10 biswansi share in Tilokpur and sufficient court fee has been paid upon that share and *no order* on Review will effect any other part of the judgment passed *by this* Honourable Court.

The principle laid down in 7 Madras High Court Reports, page *1*, *Appendix*, and specially 4 Bombay Indian Law Reports, page 23, *applies to the facts* of this case, which have not been dissented from in 3 *Calc. W. N.*

The present case is distinguishable from the Calcutta case and the case reported in the Weekly Notes for 1898, because in those cases the suit did not embrace several distinct subjects nor was the interest of the applicant for Review in those cases limited to a single item of property *as in the case here.*

For the reason submitted above, I contend that the court fee paid is sufficient."

The Taxing officer referred the case to the Taxing Judge and his report was as follows:—

"In this case the plaintiff sued for possession of property situate in several villages, including Tilokpur, and for damages, and certain *other reliefs* which do not concern the question for decision. The court of first instance granted the plaintiff's claim in full as to possession and damages. On appeal the High Court granted the plaintiff's claim for possession, but dismissed his suit as regards damages. Among the property for possession of which the High Court granted a decree to the plaintiff was a share in Tilokpur amounting *to* 11 biswas 17 biswansis 2 kachwansis. It is alleged that this share should be 11 biswas 7

biswansi 2 kachwansi, and on this ground this application has been filed for review of the judgment of the High Court. There were several defendants to this suit and it is admitted that the present defendant-applicant's interest was limited to the property in Tilokpur.

The question is how the application should be stamped with reference to the provisions of article 4 of the first schedule to the Court Fees Act. The office contends that the proper stamp is that paid on the original appeal in the High Court.

The learned counsel for the objector contends that it should be stamped on the value of 10 biswansis with reference to which correction is sought.

It seems to me that it might also be stamped with reference to the value of the share in Tilokpur which represented the applicant's interest in the appeal. Rulings are divergent. A ruling in O. W. N., III, p. 293, supports the view of the office. It was held in this case that an application for review as to costs should have been stamped with reference to the entire value of the suit.

On the other hand a ruling in the Madras High Court Report, 1871-1872, p. 1. lays down that the Court Fee must be levied on the amount which would be obtained if a review were granted.

There is also a ruling by the Bombay Court reported in I. L. R., 4 Bom., p. 26 which appears to support the suggestion I have made above. In it, it was held that when a "plaint or memorandum of appeal comprises a number of claim and a portion only of such claims has been allowed by the judgment the applicant for review should be required to stamp his application for review with a fee sufficient to cover the amount of the claim in regard to which he wishes the court to review its judgment."

This case is not exactly on all fours with the present one. But it has certain points of resemblance. It is admitted that the present applicant was interested in only a part of the subject-matter of the suit and appeal. Therefore only part of the decrees of the first court and the appellate court affected him. It is only this part of the decree of the appellate court with reference to which he seeks review. It is therefore only a small extension of the principle laid down in the Bombay ruling to require him to pay fees with respect to this part alone. I might further point out that the present applicant who was one of the defendants in the original suit might have brought his appeal as to the part of the original decree affecting him by *himself*. In that case of course he would have only had to pay fees on the present application with reference to the value of that appeal alone."

As the rulings are conflicting, I submit the case for the order of the Honourable Taxing Judge."

The case being laid before the Taxing Judge,

Maulvi *Ghulam Mujtaba*, for the applicant, contended that the governing word in schedule 1, article 4, was 'leviable,' which did not mean 'levied,' but meant that the fee on an application for Review was the fee payable on the memorandum of appeal,

1909

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

if the appeal were limited to the subject-matter of the Review. If the legislature had intended that the fee paid on the memorandum of appeal would be payable on an application for Review, the word used would have been 'levied' and not 'leviable.' In construing fiscal enactments a construction favourable to the subject should be placed upon the words. *Amanat Begam* v. *Bhajan Lal* (1), and *Anonymous case* (2).

Moreover a literal construction would lead to hardship and absurdity and if a literal construction leads to anomalies or absurdities, it must be avoided. *Kaylash Chandra* v. *Tarak Nath* (3) *Proceedings, 16th January,* 1872 (4). *In re Manohar* v. *Tambekar* (5). *Ful Chand* v. *Bai Ichha* (6). *Nobin Chandra* v. *Uzir Ali* (7). *Imdad Hasan* v. *Badri Prasad* (8).

The Government Advocate (*Mr. W. Wallach*), for the Crown, submitted that the words "the plaint or memorandum of appeal" could only mean the plaint or memorandum of appeal in which the judgment was pronounced.

AIKMAN, J.—This is a reference under section 5 of the Court Fees Act, 1870.

The question for decision is as to the proper fee leviable on an application for review of judgment presented on or after the 90th day from the date of the decree, when the application refers only to a portion of the decree. *Article* 4, schedule I, of the Act provides that the fee leviable on an application *for review* of judgment presented on or after the 90th day *from* the *date* of the decree is "the fee leviable on the plaint or memorandum of appeal." I have had the advantage of hearing the question argued by the learned vakil for the applicant and by the learned Government Advocate as representing the Crown. The Act, it will be seen, draws no distinction between applications for review of judgment when the application affects the whole of the decree or only a portion thereof. No doubt the leading principle of the Act is that the amount of the court fee bears relation to the amount of relief sought, but in the words which I have to construe, I can find nothing to make this principle applicable. The

(1) (1887) I. L. R., 8 All. 438, 441, F. B.
(2) (1881) I. L. R., 10 Calc. 274, 282.
(3) (1897) I. L. R., 25 Calc. 571, 578.
(4) (1872) 7 Mad. H. C. R., App. 1.
(5) (1879) I. L. R., 4 Bom. 25, 27.
(6) (1899) I. L. R., 24 Bom. 63.
(7) (1898) 3 C. W. N., 291.
(8) (1893) 13 A. W. N., 204.

proper fee for an application for review of judgment is declared to be the fee leviable on the plaint or memorandum of appeal. Now what does the Act mean by the plaint or memorandum of appeal? In my opinion it can only mean the plaint or memorandum of appeal, in which the judgment, review of which is asked for, was passed. No doubt this provision of the law may work hardships and I do not lose sight of the fact that in cases of doubt a fiscal regulation should be construed in favour of the subject. It appears to me, however, in this case that the words I have quoted do not admit of any doubt. It is to be noted that the Court Fees Act contains a special provision in regard to applications for review of judgment. This is to be found in section 15 of the Act. That section authorises a successful applicant for review of judgment save when he succeeds wholly or in part on the ground of fresh evidence, which he could not produce at the original hearing to receive back nearly the whole of his fee he had to pay on this application for review. In the present case the application for review is based on the allegation of a mistake or error apparent on the face of the record and if successful, the applicant will receive back all but Rs. 2. If I accepted the argument of the learned vakil for the applicant, I should have to read the Act as if it ran "The fee leviable on a plaint or memorandum of appeal asking for the same relief as that asked for in the application for review." In the case reported in 7 Madras H. C. Reports (1) it appears that the majority of the court considered that they might read the Act as it ran in the manner indicated, but it appears to me that to do so would be to go beyond the province of a court in interpreting the words of the Act. The learned vakil for the applicant also relies on the decision of MELVILL, J., *in re Manohar Tambekar* (2). That decision is in favour of the applicant, but the learned Judge admits that he arrived at it "not without hesitation." The case of *Nobin Chundra Chackerbutty* v. *Mohamed Uzir Ali Sarkar* (3), is against the applicant; so is also the view taken by the Taxing Officer of this Court in *Imdad Hasan Khan* v. *Badri Prasad* (4). It is possible that the construction which I place

(1) (1872) 7 Mad H. C. Rep., app. 1.
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(4) Weekly Notes, 1898, p. 212.

1909

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

on the section may in some instances be productive of hardship, but in my opinion the words of the Act admit of no interpretation other than what I place on them. If there is any hardship, the remedy is an amendment of the law. My reply to the reference is that the office report to the effect that the application must bear the court-fee leviable on the memorandum of appeal is correct. I omitted to say that the learned vakil based his argument on the use of the word 'leviable' instead of 'levied'. It appears to me that this word was used in order to provide for an application for review by a defendant or respondent in the case of a suit or appeal in *forma pauperis*.

VOL. XXXI.] [PART VII.



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INDEX.

PAGE.

PAGE.

PAGE.

proper fee for an application for review of judgment is declared to be the fee leviable on the plaint or memorandum of appeal. Now what does the Act mean by the plaint or memorandum of appeal? In my opinion it can only mean the plaint or memorandum of appeal, in which the judgment, review of which is asked for, was passed. No doubt this provision of the law may work hardships and I do not lose sight of the fact that in cases of doubt a fiscal regulation should be construed in favour of the subject. It appears to me, however, in this case that the words I have quoted do not admit of any doubt. It is to be noted that the Court Fees Act contains a special provision in regard to applications for review of judgment. This is to be found in section 15 of the Act. That section authorises a successful applicant for review of judgment save when he succeeds wholly or in part on the ground of fresh evidence, which he could not produce at the original hearing to receive back nearly the whole of his fee he had to pay on this application for review. In the present case the application for review is based on the allegation of a mistake or error apparent on the face of the record and if successful, the applicant will receive back all but Rs. 2. If I accepted the argument of the learned vakil for the applicant, I should have to read the Act as if it ran "The fee leviable on a plaint or memorandum of appeal asking for the same relief as that asked for in the application for review." In the case reported in 7 Madras H. C. Reports (1) it appears that the majority of the court considered that they might read the Act as it ran in the manner indicated, but it appears to me that to do so would be to go beyond the province of a court in interpreting the words of the Act. The learned vakil for the applicant also relies on the decision of MELVILL, J., *in re Manohar Tambekar* (2). That decision is in favour of the applicant, but the learned Judge admits that he arrived at it "not without hesitation." The case of *Nobin Chundra Chackerbutty* v. *Mohamed Uzir Ali Sarkar* (3), is against the applicant; so is also the view taken by the Taxing Officer of this Court in *Imdad Hasan Khan* v. *Badri Prasad* (4). It is possible that the construction which I place

(1) (1872) 7 Mad. H. C. Rep., app. 1.
(2) (1879) I. L. R., 4 Bom., 26.
(3) (1898) 3 C. W. N., 292.
(4) Weekly Notes, 1893, p. 212.

1909

IN THE MATTER OF SHEIKH MAQBUL AHMAD.

on the section may in some instances be productive of hardship, but in my opinion the words of the Act admit of no interpretation other than what I place on them. If there is any hardship, the remedy is an amendment of the law. My reply to the reference is that the office report to the effect that the application must bear the court-fee leviable on the memorandum of appeal is correct. I omitted to say that the learned vakil based his argument on the use of the word 'leviable' instead of 'levied'. It appears to me that this word was used in order to provide for an application for review by a defendant or respondent in the case of a suit or appeal in *forma pauperis*.

1909
February 5.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

KALKA PRASAD AND OTHERS (DEFENDANTS) *v.* BHUIYAN DIN AND ANOTHER (PLAINTIFFS).*

Mortgage by conditional sale—Stipulation for redemption within seven years—Suit for redemption—Limitation—Starting point.

The plaintiffs' ancestor executed a sale-deed of certain property in favour of the defendant's ancestor who simultaneously executed an agreement to reconvey. The latter deed provided that if within a period of seven years (*andar miad sat sal*) the vendors paid to the vendee Rs. 300, which was the consideration for the sale, the vendee would reconvey the property. *Held* that the transaction amounted to a mortgage by conditional sale, that the mortgagor had no right to redeem the mortgage before the expiry of seven years from the date of the mortgage, and that time did not begin to run until after seven years from the execution of the mortgage.

THE facts of this case are as follows:—

The plaintiffs' ancestors sold a 5 annas 4 pies share in mauza Madanpur to Mannilal, ancestor of defendants, for Rs. 300 on 13th May 1845, and there was a simultaneous agreement by Mannilal to reconvey the property to his vendors on receipt of Rs. 300 within seven years. The present suit was brought on 22nd January 1907, for redemption on the allegation that the mortgage had been paid off, but that the plaintiffs were ready to pay any money if found due. The defendants pleaded that there was no mortgage by conditional sale, that there was no sale or

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*First Appeal No. 16 of 1908, from an order of Bipin Behari Mukerji, Judge of Small Cause Court, Cawnpore exercising powers of a Subordinate Judge, dated the 20th of December 1907.

simultaneous agreement in 1845, but that the property was purchased by their ancestor Mannilal in 1852 for Rs. 1,000 from the plaintiffs' ancestors. The Munsif held that there was an out and out sale by plaintiffs' ancestors to Mannilal in 1852 and that no suit for redemption lay. The lower appellate court held that the share in dispute was not sold in 1852 to Mannilal, that the transaction of 1845 was a mortgage by conditional sale and that the suit was not barred by limitation as time ran from the expiry of seven years after 1845 and not from the date of execution, 13th May 1845, and remanded the case. The material portion of the deed of 13th May 1845, dealing with the period within which redemption would be allowed, was as follows:—

"Therefore, I agree and give it in writing that whenever the vendor aforesaid, according to the time mentioned in the agreement (*andar miad sat baras*), will pay to the vendee, I the vendee shall get recorded, as heretofore, the name of the said vendor in the Government books."

The defendants appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants, submitted that the court had to see whether there was a contract not to repay within seven years. The words used were "*andar miad sat baras*," which did not show that the mortgagor could not repay before seven years. They only fixed a maximum limit of seven years. If no restraint were placed on the choice of the mortgagor he might exercise his choice at any time before the seven years. The case of *Husaini Khanam* v. *Husain Khan* (1) relied on by the court below was in conflict with the earlier authorities. He relied on *Chatarbhuj* v. *Raghbar Dial* (2), *Rose Ammal* v. *Rajarathnam Ammal* (3), *Raghubar Dayal* v. *Budhu Lal* (4), *Bhagwat Das* v. *Parshad Singh* (5), *Setrucherla Ramabhadra* v. *Vairicherla Surianarayna* (6) and *Marana* v. *Pendyala* (7), *Bhawani* v. *Sheodihl*, (8) *De Braam* v. *Ford*, (9).

Dr. *Satish Chander Banerji*, for the respondents, submitted that the right to redeem accrued when the mortgage money

(1) (1907) I. L. R., 29 All., 471.
(2) Weekly Notes 1901, p. 36.
(3) (1898) I. L. R., 23 Mad., 33.
(4) (1885) I. L. R., 8 All., 95.
(5) (1888) I. L. R., 10 All., 602.
(6) (1880) I. L. R., 2 Mad., 314.
(7) (1881) I. L. R., 3 Mad., 230.
(8) (1904) I. L. R., 26 All., 479.
(9) (1900) L. R., 1 Ch. 142.

became payable. The rights of foreclosure and redemption were co-extensive unless there was a contract to the contrary. He cited Ghosh's *Law of Mortgage*, (3rd edition), p. 256 and submitted that cases decided before the Transfer of Property Act would throw no light upon the question. The mortgage money became payable when the mortgagor was bound to pay, and the obligation here would not be complete until seven years had elapsed. *Tirugnana* v. *Nallatambi* (1), *Vadju* v. *Vadju* (2).

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit for redemption of a mortgage alleged to have been made on the 13th of May 1845. The plaintiffs' case was that on the date mentioned above a sale deed was executed in favour of the predecessor in title of the defendants by the predecessor in title of the plaintiffs and on the same date the predecessor in title of the defendants executed an agreement to reconvey the property on receipt of Rs. 200, the amount of consideration mentioned in the sale deed, within seven years, no account being taken of interest or profits, that the transaction was that of a mortgage by way of conditional sale and that they were entitled to redeem it. The defendants denied the transaction referred to by the plaintiffs and asserted that an absolute sale of the property for Rs. 1,000 had been made in favour of their predecessor in title in 1852. The lower appellate court has found that this allegation of the defendants is not made out and this finding is not impugned in this appeal. The court below was of opinion that the predecessor in title of the plaintiffs made a mortgage by way of conditional sale in favour of the defendants' predecessor in title and that the claim of the plaintiffs was not time barred. As the court of first instance had dismissed the suit upon the finding that the alleged sale of 1852 had been made out, the lower appellate court remanded the case under section 562 of the old Code of Civil Procedure (Act No. XIV of 1882) for decision of the other issues. From this order of remand the present appeal has been filed. The first plea taken in the memorandum of appeal is that upon a proper construction of the deed of 1845 the transaction was an out and out sale with a condition of repurchase. This plea has not been pressed. We may

(1) (1892) I. L. R., 16 Mad., 486. (2) (1880) I. L. R., 5 Bom., 22.

say that we agree with the learned Subordinate Judge in his conclusion as to the nature of the transaction. The learned Advocate for the appellants has confined his argument to the second plea, namely, that the claim is barred by time. He contends that the mortgagor had a right to redeem at any time within seven years, that this right to redeem therefore accrued on the date of the mortgage and that as the suit was brought more than sixty years after the accrual of that right, the claim is time-barred. A number of rulings have been cited to us which are not all in harmony. The latest ruling, namely *Husaini Khanam* v. *Husain Khan* (1), on which the court below relies, supports the view of the learned Judge. In the view which we take of the case we do not deem it necessary to enter into a consideration of the various authorities which have been cited. We think that in each case we must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was. Having regard to the nature of the mortgage in the present case we do not think that it would be reasonable to hold that the mortgagor had a right to redeem before the expiry of seven years from the date of the mortgage. The transaction was on the face of it one of absolute sale, but as an agreement was executed on the same date to reconvey the property, and from the terms of the agreement it is manifest that the intention was that a conditional sale should be effected and the mortgagee should enter into possession and enjoy the profits in lieu of interest, it is in the highest degree improbable that it was intended that the mortgagee should have possession for any term less than seven years. He clearly had not the right to foreclose the mortgage before the expiry of that term and we do not think that the intention was that the mortgagor should have the right to re-enter into possession at an earlier date. It is true that at one place it is said in the document executed by the mortgagee that the mortgagor should pay the money "within seven years," but further on, it speaks of payment being made "according to the period mentioned in it" *(hasb miyad mundarja ikrarnama)*. Having regard to these circumstances the right to redeem did not, in our opinion, accrue until the expiry of the seven years.

(1) (1907) I. L. R., 29. All., 471.

1909

KALKA PRASAD v. BHUIYAN DIN.

became payable. The rights of foreclosure and redemption were co-extensive unless there was a contract to the contrary. He cited Ghosh's *Law of Mortgage*, (3rd edition), p. 286 and submitted that cases decided before the Transfer of Property Act would throw no light upon the question. The mortgage money became payable when the mortgagor was bound to pay, and the obligation here would not be complete until seven years had elapsed. *Tirugnana* v. *Nallatambi* (1), *Vadju* v. *Vadju* (2).

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[illegible]

been made out, the lower appellate court remanded the case under section 562 of the old Code of Civil Procedure (Act No. XIV of 1882) for decision of the other issues. From this order of remand the present appeal has been filed. The first plea taken in the memorandum of appeal is that upon a proper construction of the deed of 1845 the transaction was an out and out sale with a condition of repurchase. This plea has not been pressed. We may

(1) (1892) I. L. R., 16 Mad., 486. (2) (1880) I. L. R., 5 Bom., 22.

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(1) (1907) I. L. R., 29. All., 471.

1909

KALKA PRASAD v. BHUIYAN DIN.

The suit is therefore within time. We dismiss the appeal with costs.

Appeal dismissed.

1909.
February 10.

Before Mr. Justice Aikman, and Mr. Justice Richards.

DEVI PRASAD (DECREE-HOLDER) *v.* A. H. LEWIS (JUDGMENT-DEBTOR).*

Code of Civil Procedure (Act No. XIV of 1882), section 266—Execution of decree—Attachment of future salary of private servant.

Where a decree-holder applied on the 18th November 1907, for attachment of the judgment-debtor's salary for November and the succeeding months, the judgment-debtor being a lawyer's clerk, *held* that the unearned salary of a private servant in whole or in part was not liable to attachment in advance. *Holmes* v. *Millage* (1), and *Ayyavayyar* v. *Virasami* (2), referred to and followed. *Harshankar* v. *Baijnath* (3), distinguished.

THE facts of this case are as follows:—

The appellant Debi Prasad obtained a decree against the respondent who was a private clerk in the employment of Pandit Pirthinath, a pleader of Cawnpore. On the 18th November 1907, the appellant applied for attachment of the salary of his judgment debtor for November and the succeeding months. The judgment-debtor objected to the attachment on the ground, among others, that on 25th November 1907, his salary for November was not due and that future salary could not be attached. Both the lower courts allowed the objection. The decree-holder appealed to the High Court.

Babu *Satya Narain* (with him Pandit *Baldeo Ram Dave*), for the appellant, contended that the salary of a private servant was a debt and was therefore liable to attachment under section 266 of the Civil Procedure Code. It was clear that future debts could be attached, as the explanation to section 266 exempted from attachment certain properties, future salary not being among them. By section 268 the manner in which the future salary of a Public Officer could be attached was indicated. There was no difference in principle between the salary of a public servant

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* Second Appeal No. 723 of 1908 from a decree of J. H. Cumming, District Judge of Cawnpore, dated the 30th of April 1908, confirming a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 1st of February 1908.

(1) (1893) 1 Q. B., 551. (2) (1897) I. L. R., 21 Mad., [illegible].
(3) (1901) I. L. R., 23 All., 164.

and that of a private servant. He referred to *Ayyavayyar* v. *Virasami Mudali* (1), *Harshankar* v. *Baijnath* (2), *Maniswar* v. *Bir Partab* (3).

No one appeared for the respondent.

The following judgments were delivered:—

RICHARDS, J.—This appeal arises out of an application for the attachment of the salary of the respondent, who is a clerk in [illegible]

Ca[illegible]

due at the time of the application for attachment and having regard to the date of the application none would be due in the ordinary course of events. Both the courts below have treated the application as being an application for the attachment of the future salary of the respondent. The application itself was an application to attach a sum of Rs. 150 every month. Section 266 of the old Code of Civil Procedure (which was in force at the time) specifies the classes of property etc. liable to attachment and sale in execution of a decree. They are as follows:—" Land, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory-notes, Government securities, bonds or other securities for money, debts, shares in the capital or joint stock of any railway, banking or other public company or corporation, and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf." It is perfectly clear that the future salary of the respondent is not included in the above enumeration unless it is covered by the expression 'debts'. It certainly does not come under the heading "other saleable property.' It is in fact not 'property' at all. It seems to me also that giving the word 'debt' its ordinary and natural meaning, future or unearned pay of a lawyer's clerk is not a debt. The respondent could not sue his master for salary before it is earned. It is not even a debt payable in *future*. Its payment depends

(1) (1897) I. L. R. 21 Mad. 333. (2) (1901) I. L. R. 23 All., 164.
(3) (1871) 6 B. L. R. 613.

1909

DEVI PRASAD v. A. H. LEWIS.

Richards, J.

upon the continuance of the contract of service. If the section had ended with the passage quoted above, I think it perfectly clear that the order of the Court below would be perfectly correct and that the future salary of the respondent could not be attached in execution of the decree. It has strongly been urged, however, that some of the exceptions set forth in the remainder of the section clearly show that future earnings are capable of attachment; for example, clause *(i)* partially exempts the salary of certain public officers and servants, clause *(e)* absolutely exempts the wages of labourers and domestic servants. It is said that the introduction of these exceptions demonstrates that but for these exceptions the salaries of public servants and wages of domestic servants could be attached. The explanation to the section is also relied on as showing that the section contemplates non-excepted wages being attached before they are due. It is further urged that section 268 shows that in the case of the salary of a public officer or a Railway servant the attachment might be of the salary in advance. This section provides, amongst other things, that in the case of the salary of a public officer or the servant of a railway company the attachment shall be made by a written order requiring the officer whose duty it is to disburse the salary to withhold every month such portion as the court may direct. This provision does appear to imply that in the case of public officers and railway servants an attachment of future salary is contemplated. It is said that section 268 merely contains directions how the attachment of certain classes of debts etc. is to be carried out and that it does not purport to make attachable property or debts of railway or public servants that would not be attachable if they belonged to other persons. I confess that I feel the weight of these arguments. The wages of domestic servants seems to me in principle not to be distinguishable from the salary of a vakil's clerk, and if unearned wages of a domestic servant are not debts or other saleable property within the meaning of the section, it is hard to understand where the necessity was for making the exception, unless it was for the purpose of enacting that such wages could not be attached even when they had become debt. If this was what was desired, it could have [illegible] for in a much simpler way. It is, however, quite

clear that in England unearned salary in a case like the present could not be made available in execution of a judgment by garnishee proceedings or by the appointment of a receiver by way of equitable execution. See *Holmes* v. *Millage* (1). No case has been cited to us in which in this country unearned salary of a servant has been attached and in the case of *Ayyavayyar* v. *Virasami Mudali* (2), it was held that such wages could not be attached in whole or part before they were earned. The public inconvenience of allowing such wages to be attached is obvious.

I have already pointed out that unearned salary does *not* come under any of the descriptions enumerated in section 266 in the natural and ordinary sense of such descriptions. I think therefore that I am justified in resisting the argument that the rest of section 266 and the provisions of section 268 necessarily imply that unearned salary in a case like the present can be attached in execution of a decree. Following therefore with some hesitation the decision of the High Court in Madras and what appears to have been the universal practice, I would dismiss the appeal.

AIKMAN, J.—I am also of opinion that this appeal must be dismissed. The case relied on by the court below, namely *Ayyavayyar* v. *Virasami Mudali* (2), fully supports the Judge's order and I agree with the decision in that case. Neither the old nor the new Code contains any provision for the attachment in advance of the salary of an employé like the respondent. The exemptions contained in section 266 of Act No. XIV of 1882 may be read as applying to salaries already earned. The learned vakil for the appellant, who argued the case extremely well, was unable to refer us to any decision either in this country or in England in which an attachment such as prayed for here was granted. He relied on one case *Harshankar Prasad Singh* v. *Baijnath Das* (3), but that case is easily distinguishable from the present. Their property was sold. Part of the consideration was cash paid down and part was an annuity payable to the vendor. It is clear that in that case there was an existing debt, although the payment of it was deferred. I would also dismiss the appeal.

(1) (1893) 1 Q. B., 551. (2) (1897) I. L. R., 21 Mad., 393.
(3) (1901) I. L. R., 23 All., 164.

1909

DEVI PRASAD v. A. H. LEWIS.

BY THE COURT:—The appeal is dismissed but without costs as the respondent is not represented.

Appeal dismissed.

1909. *February* 11.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

THAKUR PARSHAD (PLAINTIFF) *v.* JAMNA KUNWAR AND OTHERS (DEFENDANTS.)*

*Will—Construction—*Malik—*Meaning of—Absolute interest—Hindu widows.*

Unless there is something in the context qualifying it the word *malik* used in a will bears its technical meaning. When a testator bequeathed his property to his issue if he happened to have any, and if he had no issue then to his mother and wife who were to be "*malik aur kabiz*," *held* that the ladies obtained an absolute interest. *Surajmani* v. *Rabi Nath* (1) referred to.

THE facts appear from the judgment of their lordships.

Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellant.

Pandit *Motilal Nehru*, Munshi *Gobind Prasad* and Babu *Satya Chandra Mukerji*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The only question in this appeal is whether Suraj Prasad, the last owner of the property in suit, conferred upon his mother Jamna Kunwar by his will, dated the 9th of April 1902, an absolute estate in one half of the property left by him. The will provides that in the event of his marrying again and having issue, such issue shall be the owner (*malik*) of his property like himself. It then goes on to say "If I happen to have no issue, the names of my wife and mother shall be entered in equal shares and they shall be owners and in possession (*malik aur kabiz*)." It is urged that the mother of the deceased, Musammat Jamna Kunwar, acquired a life estate only and not an absolute estate under the terms of this will. The word *malik* has been interpreted in the recent ruling of the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (1). In that case their Lordships observe that "in order to cut down the full proprietary rights that the word (*malik*) imports something must be found in the context qualifying it." In the present case there is nothing in the context to qualify the word *malik* and

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* First Appeal No. 248 of 1907 from a decree of R. J. Dalal, Additional District Judge of Cawnpore, dated the 11th of June 1907.

(1) (1908) I. L. R., 30, All., 84, P. C.

1903

THAKUR PRASAD v. JAMNA KUNWAR.

to indicate that the intention was that the word should not "bear its proper technical meaning." On the contrary while speaking of the rights of his issue, Suraj Prasad uses the word *malik*, indicating clearly that the issue should be the absolute owners. The same word is used in respect of his wife and his mother. There is nothing to "displace the presumption of absolute ownership implied in the word *malik*." We are, therefore, of opinion that the view taken by the court below is right and this appeal must fail. We accordingly dimiss it with costs.

Appeal dismissed.

1909
February 12.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

LALTA PRASAD (DECREE-HOLDER) *v.* SURAJ KUMAR AND OTHERS (JUDGMENT-DEBTORS).*

Act No. XV of 1877 (Indian Limitation Act), Schdule II, Article 179, Ex. 1. Decree executed against minor judgment debtors—Saving of limitation against other judgment-debtors.

Where a decree was passed against two persons who were minors and others who were majors but the decree against the minors was subsequently declared to be inoperative, and the decree-holder never took out execution within three years from the date of his decree against his judgment-debtors other than those who were minors, *held* that in view of Article 179, (1) of the second schedule of the Indian Limitation Act the application for execution against the minors only were applications in accordance with law and saved the operation of limitation against all.

THE facts of this case are that the appellant and another obtained a decree against the respondents and two minors Kundan Lal and Balbhadra Prasad in 1900, which on appeal was affirmed by the High Court on February 19th, 1903. The said minors were represented in the suit by their mother, a married woman, but the defect was not noticed. On 24th August 1904, the decree-holder applied to execute the decree against the minors but execution was stayed as the minors had brought a suit through another guardian for a declaration that the decree was not binding on them as they had not been properly represented. The first Court dismissed that suit on 31st May 1905, and the decree-holders thereupon renewed their application on 6th June

* First Appeal No. 220 of 1903 from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 12th May 1903.

1909

DEVI PRASAD v. A. H. LEWIS.

BY THE COURT:—The appeal is dismissed but without costs as the respondent is not represented.

Appeal dismissed.

1909. *February* 11.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

THAKUR PARSHAD (PLAINTIFF) v. JAMNA KUNWAR AND OTHERS (DEFENDANTS)*

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* First Appeal No. 248 of 1907 from a decree of B. J. Dalal, Additional District Judge of Cawnpore, dated the 11th of June 1907.

(1) (1904) I. L. R., 30 All., 84, P. C.

KNOX and GRIFFIN JJ.—Lalta Prasad was one of two decree-holders in whose favour a decree was passed for the recovery of money from certain judgment-debtors, two of whom were, at the time when the decree was passed, minors, *viz.* Kundan Lal and Balbhadar Prasad. The decree was passed jointly against them under the guardianship of their mother, a married woman whose husband was alive, and against others who were majors at the time. The decree bears date the 17th November 1900. It was carried into appeal up to this Court and the decree was affirmed on the 19th April 1903. Thereafter execution was taken out against the minors on the 24th August 1904. When these execution proceedings were being taken out the minors were still represented by the lady who had represented them throughout the suit. It then occurred to the minors or some one on their behalf that the decree, so far as they were concerned, was a decree that could be challenged, inasmuch as, when it was obtained the person who purported to represent them was not legally qualified to do so. They accordingly brought a suit to have the decree set aside and the execution proceedings were for the time stayed by order of the court. The suit was dismissed by the court in which it was first brought and the decree-holders at once resumed their application for execution again naming the lady already mentioned as guardian. In the meanwhile an appeal was brought on behalf of the minors and on the 1st July 1907, it was held by this Court, that the decree obtained on the 17th November 1900 was inoperative as against the minors. Thereupon the decree-holders lost no time in taking out execution proceedings against the other defendants. The defendants raised two objections: firstly, that there was an understanding between the decree-holders and themselves that the decretal money should be in the first instance realized from the property of the minors, and secondly, that the application in the years 1904 and 1905 was of no effect and in consequence the present application was time-barred. The court very properly refused to go into the former of these objections. As regards the latter it held that the application was time-barred. It accordingly rejected the application for execution and the decree-holder, Lalta Prasad, under the guardianship of Gajadhar, comes here in appeal.

1909

LALTA PRASAD v. SURAJ KUMAR.

He contends that the execution taken out by him in 1904 and 1905, though taken out against the minors only, are, under the provisions of article 179, schedule II, Act XV of 1877, applications which take effect equally against the present respondents, and if they be held good, then the present application is not time-barred. On behalf of the respondents it was contended that the decree being, so far as the minors were concerned, null and void the applications of 1904 and 1905 were applications to execute a null and void decree and cannot have the effect of keeping the decree alive against the other judgment-debtors.

No case directly bearing upon this question has been placed before us and the matter is not free from difficulty. But after careful consideration of the words used in explanation I of article 179, schedule II of the Limitation Act we are prepared to hold that the applications at the time when they were made, namely in 1904 and 1905, were applications in accordance with law to the proper court for execution. Although for the purposes of section 235 of the old Code of Civil Procedure they were in the names only of Kundan and Balbhadar and the guardian who was not a legally qualified guardian, yet in effect they were as if they ran in names of the other judgment-debtors also; or to use the exact words of explanation I, although taken out against the minors only they did take effect against all the judgment-debtors. To hold otherwise in the present case would have this effect that the minors would escape from the decree and then under the cover of the escape of the minors the majors would escape from the effect of the decree-holder and the decree-holder would be left fruitless. This being so we think we are not putting an undue strain upon the explanation. We hold that the application for execution is not time-barred.

We accordingly set aside the decree of the lower court and return the application to the court below with directions to re-admit it in its original number in the register and to dispose of it according to law. Under the circumstances we make no order as to costs.

Appeal decreed.

REVISIONAL CIVIL.

1909
February 12.

Before Mr. Justice Karamat Husain.

WAZIR MUHAMMAD AND ANOTHER (OPPOSITE PARTIES) *v.* HUB LAL (APPLICANT.) *

Criminal Procedure Code (Act V of 1898), section 195 (7)(c)—Sanction to prosecute—Granted by Collector—Set aside by District Judge—Jurisdiction.

Where a Collector granted sanction for prosecution for perjury in a case in which no appeal lay, and the District Judge revoked the sanction, *held* that under clause (c) of sub-section 7 of section 195 of the Code of Criminal Procedure, the District Judge, as being the principal court of original jurisdiction, had jurisdiction to revoke the sanction.

THIS was an application for revision on the civil side of the High Court against an order revoking a sanction granted for the prosecution of one Hub Lal. The facts of the case appear from the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the applicant.

Dr. *Tej Bahadur Sapru*, for the opposite party.

KARAMAT HUSAIN, J.—A suit for arrears of rent of a sum below Rs. 100 was instituted in the court of an Assistant Collector of the 2nd class and was decreed. Hub Lal patwari was a witness for the plaintiff. There was an appeal under section 176 of the Agra Tenancy Act to the Collector who dismissed the suit and granted sanction for the prosecution of Hub Lal under sections 193, 465, 471 and 466, Indian Penal Code, on the 9th of September 1907. Hub Lal applied in revision to the District Judge of Cawnpore, who on the 6th of March 1908, revoked the sanction. Wazir Muhammad and Amir Muhammad now apply for revision of the order passed by the learned District Judge. Their learned vakil argues that the learned District Judge had no jurisdiction to revoke the sanction granted by the Collector of Fatehpur inasmuch as the court of the District Judge of Cawnpore is not a court to which the court of the Collector of Fatehpur is subordinate for the purposes of section 195 of the Criminal Procedure Code. Clause (7) of that section runs as follows :—" For the purposes of this section every court shall be deemed to be subordinate only to the court to which appeals from the former court ordinarily lie, that is to say—(*a*) where such appeals lie to more

* Civil Revision No. 54 of 1908 from an order of J. H. Cumming, District Judge of Cawnpore, dated the 6th of March 1908.

1909

WAZIR MUHAMMAD v. HUB LAL.

than one court, the appellate court of inferior jurisdiction shall be the court to which such court shall be deemed to be subordinate;

(b) Where such appeals lie to a civil and also to a revenue court, such court shall be deemed to be subordinate to the civil or revenue court according to the nature of the case in connection with which the offence is alleged to have been committed;

(c) Where no appeal lies, such court shall be deemed to be subordinate to the principal court of original jurisdiction within the local limits of whose jurisdiction such first mentioned court is situate."

In the present case which was decided by the Collector of Fatehpur, there is no appeal from his order to any court. The case will therefore be governed by clause 7 (c), section 195. Mr. Satya Chandra contends that that clause is applicable to a Court of Small Causes from the orders of which there is no appeal to any court. The learned advocate for Hub Lal, on the other hand, contends that the application of that clause is not limited to the Court of Small Causes but extends to all courts when their orders are not appealable. I am of opinion that the clause is not limited to the Court of Small Causes but applies to every court, when there is no appeal from its decision. The finality of the decision of the court with reference to the nature of the case and not with reference to the constitution of the court is the element which determines subordination. If I hold that the clause applies to the Court of Small Causes only, many offences committed before other courts in cases in which there is no appeal from their orders, will be unpunishable and the safeguard provided by section 195 of the Code of Criminal Procedure against the contempt of the lawful authority of public servants will lose much of its beneficial effects. I therefore hold that the Collector of Fatehpur, with reference to the nature of the case in connection with which the offence was committed, was subordinate to the District Judge of Cawnpore and dismiss the application.

Application rejected.

APPELLATE CIVIL.

1909
February 13.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

CHEDI LAL (DEFENDANT) v. JWALA PRASAD (PLAINTIFF.) *

Act No. IX of 1873—(Indian Oaths Act), sections 9, 11—Defendant taking oath proposed by plaintiff—Oath conclusive.

The plaintiff in a suit stated that he would accept whatever evidence the defendant would give with Ganges water in his hand and on his honour. The defendant swore with Ganges water in his hand that the claim was false inasmuch as the amount due to the plaintiff had been set off against a large sum due to the defendant. *Held* that the suit must be dismissed, the defendant having sworn in the manner prescribed.

THE facts of this case are as follows:—

The plaintiff Jwala Prasad sued Chhedi Lal and others for a sum of money. During the course of the proceedings the plaintiff made a statement that he would accept whatever amount the defendant Chhedi Lal would admit as due by swearing on Ganges water and on his honour *(ba half gangajali wa imanse kah de)*. The oath proposed was accepted by the defendant Chhedi Lal and he made a solemn affirmation with Ganges water in his hand and stated that the plaintiff's claim was totally false, that the plaintiff owed a larger sum of money to him than he owed the plaintiff and that the amount due by him had been set off against the amount due to him. The Subordinate Judge decreed the plaintiff's claim holding that the statement amounted to an admission and there was no proof of the set off claimed by the defendant. On appeal the District Judge, while holding that the Subordinate Judge was bound to dismiss the claim on the statement made by Chhedi Lal if the oath was taken as precisely prescribed for him, held that the oath was not taken in the manner proposed as Chhedi Lal took the oath only on Ganges water and not also on his however. He accordingly dismissed Chhedi Lal's appeal. Chhedi Lal appealed to the High Court.

Munshi *Gokul Prasad* (for whom Dr. *Tej Bahadur Sapru*) for the appellant, contended that the oath was in the manner prescribed by the plaintiff, as he took the oath on Ganges water and if there was any irregularity it was cured by section 13 of the Oaths Act. The whole statement of Chhedi Lal should be

* Second Appeal No. 1447 of 1907 from a decree of H. E. Holme, District Judge of Jhansi, dated the 5th July 1907, modifying a decree of Pramatha Nath Banerji, Subordinate Judge of Jhansi, dated 30th of April 1907.

1909

CHEDI LAL
v.
JWALA PRASAD.

considered and not the portion only which detached from the rest is against him.

Babu *Sital Prasad Ghosh*, for the respondent, submitted that the deponent should have taken the oath with Ganges water in his hand and should have said that he made the statement on his honour, only swearing with Ganges water in his hand was not enough.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit brought by the plaintiff to recover money alleged to be due by the defendants 1 and 2 in respect of a contract for sale of intoxicating drugs taken by the defendants 1 and 2 and the plaintiff from the Collector for a term of three years. During the course of the hearing of the suit in the court of first instance the plaintiff stated that he would accept whatever evidence the defendant Chhedi Lal would give on Ganges water and on his honour and that the case might be decided accordingly. Chhedi Lal then took a solemn affirmation and taking Ganges water in his hands swore that nothing was due by him to the plaintiff and that the plaintiff's claim was wholly false. He then said that Rs. 826 has been due by him to the plaintiff, but that debt had been set off with plaintiff's consent against a considerably larger sum due by the plaintiff to him in respect of another contract. The learned Subordinate Judge decreed the plaintiff's claim as against Chhedi Lal holding that his evidence amounted to an admission that Rs. 826 were due by him to the plaintiff and that the alleged set off had not been proved. On appeal the learned District Judge held that upon the statement of the defendant, Chhedi Lal, the court of first instance was bound to dismiss the claim whether it believed Chhedi Lal's statement or not, provided that Chhedi Lal had taken the oath precisely as prescribed for him. Then the court, commenting upon the words by which Chhedi agreed to be bound, observed: "But the oath Chhedi Lal took was only on the Ganges water *(half Ganga jali)* and not also on his honour *(wa imanse)* and held that this was not as prescribed. This appears to us to be mere hair-spliting. Chhedi Lal on being sworn necessarily took an obligation upon him to give evidence on his honour and he gave his evidence having Ganges water in his hands. It was not possible for him

1909

CHEDI LAL v. JWALA PRASAD.

to take his honour in his hands as well as the Ganges water. In taking the oath which he took, he undertook on his honour to swear truthfully and having the Ganges water in his hands it appears to us that he fully satisfied all that his opponent required. He swore that nothing was due inasmuch as the debt had been set off; and in view of this evidence, which under section 11 of the Oaths Act the court was bound to accept as conclusive proof, the claim should have been dismissed. We accordingly allow the appeal, and setting aside the decree of the courts below, we dismiss the plaintiff's suit with costs including fees, in his court, on the higher scale.

Appeal decreed.

REVISIONAL CRIMINAL.

1909
February 15.

Before Mr. Justice Aikman.
EMPEROR *v.* UMER-UD-DIN*

Criminal Procedure Code (Act No V of 1898), section 403 (1)—No complaint—Order of Acquittal—Whether bar to a new trial.

A soldier from Burma sent an intimation to the District Magistrate that he had authorised his brother to file a complaint against the accused for enticing away his wife. When the case came on for hearing, it appeared that the brother had no such authority and the Magistrate acquitted the accused. The complainant then filed a complaint personally. *Held* that the previous acquittal was no bar to the trial of the present complaint inasmuch as the finding of the Magistrate amounted to this that there was no complaint before him. *Queen Empress* v. *Balwant*, (1) referred to.

Mr. *C. Ross Alston*, for the accused.

The Assistant Government Advocate, (for whom Mr. *R. Malcomson*) for the Crown.

AIKMAN, J.—In my opinion no sufficient ground exists for interfering in this case. Mohammad Farookh, a soldier serving with his regiment in Burma, sent an intimation to the District Magistrate of Bijnor that he had authorised his brother to bring a complaint against the applicant, Umer-ud-din, for enticing away his (Mohammad Farookh's) wife. This charge against the

*Criminal Revision No. 812 of 1908, against an order of A. B. Bforle, District Magistrate of Bijnor, dated the 19th November 1908.

(1) (1886) I. L. R., 9 All., 134.

1909

EMPEROR
v.
UMER-UD-DIN.

accused was heard by a Magistrate. When evidence for both sides had been recorded, it struck the Magistrate that the husband's brother held no authority to institute the case and he ended his judgment with the words "I therefore acquit the accused." Thereupon the husband, having obtained leave, came from Burma and instituted a fresh complaint. In answer to this the applicant set up the previous acquittal. In my opinion the so-called acquittal is, under the circumstances, no bar to the trial of the present charge. The Magistrate's previous finding amounted to this that there was no complaint before him of which he could take cognizance. If it were necessary I should have no hesitation in setting aside the previous so-called acquittal and directing the present trial to proceed. Vide *Queen-Empress* v. *Balwant* (1). But I do not think this is necessary and content myself with dismissing the application.

Application dismissed.

1909
February 15.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.
KHUNNI LAL (PLAINTIFF) v. MADAN MOHAN LAL AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), sections 67, 111, 116—Lease by mortgagee in favour of mortgagor—Mortgagor holding over without payment of rent—Lease when determined—Act No XV of 1877 (Indian Limitation Act), Schedule II, Article 139—Suit by mortgagee for possession.

A usufructuary mortgagee executed a lease of the mortgaged property in favour of his mortgagors for five years but after the expiry of the term of the lease neither claimed nor received rent from his mortgagors for more than 12 years and then sued them for possession of the property, *held* that the suit was barred by limitation. *Held* also that the lease determined on the expiration of five years and a tenancy from year to year did not come into existence as there was nothing to show that the landlord assented to the tenant's continuing in possession. *Prem Sukh* v. *Baupia*, (2) distinguished.

Held also that no suit for sale could be brought upon the mortgage, as the mere fact that it provided for redemption upon payment of the principal did not make it a simple mortgage.

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* Second Appeal No. 723 of 1907 from a decree of E. O. E. Leggatt, District Judge of Bareilly, dated the 12th of March 1907, confirming a decree of Pitamber Joshi, Subordinate Judge of Bareilly, dated the 20th of June 1905.

(1) (1886) I. L. R., 9 All., 135. (2) (1879) I. L. R., 2 All. 517.

THE facts of this case are as follows:—

On the 17th December 1878, two villages, Bijpuri and Bhul Bhulaniya, belonging to Musammat Shibta and Daya Ram were mortgaged with possession to Mangli Prasad and Sheo Ram for a term of five years, the deed providing that at the end of five years, the mortgagors would be entitled to redeem the mortgaged property. The mortgagors also covenanted that they would repay the principal at the end of five years in a lump sum. Shortly after the execution of the mortgage, i.e. on 5th March 1879, the mortgagees made a lease in favour of one of the mortgagors for a term of five years. Certain transactions not material to the present report took place by which Mangli Prasad, one of the two mortgagees, was paid off and the present plaintiff became the owner of half of the mortgagee rights in the two villages, Bhul Bhulaniya and Bijpuri. On the 10th September 1902, he applied for mutation of names but his application was rejected and then the present suit was brought on the 29th June 1904 for sale or in the alternative for possession of the mortgaged property. The defendants pleaded that as the mortgage was usufructuary, there could be no sale of the property, and as more than 12 years had elapsed since the date of the mortgage the claim for possession was barred. It was found by the lower court that the mortgagees sued for and obtained decrees for payment of rent reserved by the lease during the period of the lease but that after the expiration of the term of the lease the mortgagees no longer sued for rent and their title as landlord was no longer recognised. Both courts dismissed the suit. The plaintiff appealed.

Pandit *Mohan Lal Nehru* (with him Hon'ble Pandit *Madan Mohan Malaviya* and Dr. *Tej Bahadur Sapru*), for the appellant contended that as the respondents mortgagors entered into possession as lessees, there could be no adverse possession. Mere non-payment of rent would not make their possession adverse, unless there was some overt act of assertion of a hostile title. According to the provisions of section 116 of the Transfer of Property Act, in the case of holding over by a lessee, the lease is renewed. *Prem Sukh Das* v. *Bhupia* (1). Moreover the mortgage was not a pure usufructuary mortgage. There was a covenant

(1) (1879) I. L. R., 2 All., 517.

1909

Khunni Lal v. Madan Mohan Lal.

the passing of the Transfer of Property Act. Section 111 of that Act expressly provides that a lease of immovable property determines by efflux of time limited thereby. We do not think that the case we have just now quoted applies in the present case

There remains the question whether or not the plaintiff is entitled to a decree for the sale of the property. Section 67 of the Transfer of Property Act makes provision for the bringing of suits by mortgagees for the sale of the mortgaged property; but clause (a) expressly provides that a usufructuary mortgagee can under no circumstances institute a suit for foreclosure or sale. If therefore the mortgage in the present case was a usufructuary mortgage, it is quite clear that the plaintiff can have no remedy by way of sale. The mortgage on the face of it appears to be a usufructuary mortgage. It is called a usufructuary mortgage and it provides for the redemption of the property by repayment of the principal at the end of the five years. It is contended that it became a simple mortgage at the end of the term. We do not think that this contention is sound. If the mortgagees had remained in possession as they were entitled to do, the mortgagor, under the provisions of section 62 of the Transfer of Property Act, could not have recovered possession even after the expiry of the term until after he had paid or tendered to the mortgagee the principal money or deposited the same in court. We think under the circumstances that the decree of the court below was correct. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.

1909.
February 17

LAL SINGH AND OTHERS (DEFENDANTS) *v.* KHALIQ SINGH AND OTHERS (PLAINTIFFS).*

Act (local) No. II of 1901 *(Agra Tenancy Act), section* 199—*Suit for arrears of rent—Tenant not pleading proprietary title—Subsequent suit for declaration of title*—Res judicata.

In a suit for arrears of rent under Act No. II of 1901 the plaintiff did not set up his proprietary title to the land in suit. *Held* that a subsequent suit in the civil court for establishment of his proprietary right was barred by the principle of *res judicata* —*Behari* v *Sheobalak* (1) followed.

THE facts of this case are as follows :—

The plaintiffs brought the present suit for a declaration that they were the proprietors of certain plots of land and also prayed that a decree for arrears of rent passed against them on 20th January 1906, be set aside. In the Revenue papers the plots are recorded as in the cultivation of the plaintiffs. The plaintiffs twice applied for correction of the Revenue papers but the Revenue Courts disallowed the application deciding that the entry was correct. The defendants then brought a suit for enhancement of rent of all the plots and that suit was decreed on 11th March 1904 and on the basis of the decree for enhancement a suit for arrears was brought by the defendants and decreed on 20th January 1906. In the suit for arrears Khaliq Singh plaintiff had alone appeared, but in his defence he did not allege that he was proprietor of any of the plots. The lower courts decreed the plaintiffs' claim The defendants appealed to the High Court.

Mr. *Abdul Raoof*, for the appellants, contended that in the suit for arrears the present plaintiffs could have raised the question of proprietary title and that not having raised it they were barred by the principle of *res judicata* from raising it now. He relied on *Behari* v. *Sheobalak* (1).

Babu *Surendra Nath Sen*, for the respondents, contended that under section 193 of the Tenancy Act the provisions of the Civil Procedure Code were to apply only if they were not inconsistent with the Act. If the plea of title had been decided by the Revenue Court, the decision would have been *res judicata*.

* Second Appeal No. 1334 of 1907, from a decree of L. Marshall, District Judge of Mainpuri, dated the 22nd July 1907, confirming a decree of Ishri Prasad, Subordinate Judge of Mainpuri, dated the 23rd June 1906.

(1) (1907) I. L. R., 29 All., 601.

1909

LAL SINGH v. KHALIQ SINGH.

Section 199 of the Tenancy Act enacted that if the tenant pleaded proprietary title, the Revenue Court was to adopt one of the two courses mentioned therein. It was only when the plea was raised that the Revenue Court could decide the question.

RICHARDS AND KARAMAT HUSAIN, JJ.—This was a suit brought by the plaintiffs for a declaration that they were proprietors of certain plots of land which are specified in a list at the end of the plaint. They also asked to have a certain decree for rent granted by the revenue court set aside. It appears that as far back as the year 1872, the defendants or their representatives were recorded as proprietors and the plaintiffs in the present suit were recorded as cultivators in respect of the holdings the subject-matter of the present suit. In the year 1902, the plaintiffs made an application to correct the entry in the revenue papers. This application was refused. In 1903, a similar application was made with a like result. The defendants in the present suit then applied in the revenue court to have the rent payable by the plaintiffs enhanced and the application was allowed in March 1904. In the year 1906 the defendants sued the plaintiffs in the revenue court for arrears of enhanced rent. Only one of the plaintiffs in this suit, namely Khaliq Singh, appeared, but a decree was given for enhanced rent and this is the decree which it is now sought to set aside. The plaintiffs by their present suit seek to go behind all the proceedings in the revenue court and to have it declared that they are proprietors of the holding of which they have been recorded as cultivatory tenants ever since the year 1872. If the law permitted this to be done it would be very unfortunate. It would mean that the time of the revenue court in considering the question of the enhancement of rent, and also in deciding the issues between the parties in the suit for arrears of rent, would have been completely wasted, and it would tend to bring the civil and revenue courts into conflict. It does not appear that the plaintiffs ever set up their proprietary title until they instituted the present suit. When they were sued for arrears of rent it is quite clear that they did not plead the proprietary title. We have had the judgment of the revenue court in that case read to us. It has been ingeniously argued by Mr. Surendra Nath Sen

that the revenue court has only jurisdiction to decide a question of proprietary right or to order the defendant to bring a suit in a civil court under the provisions of section 199 of the Tenancy Act, in a case in which the defendant has expressly pleaded his proprietary title and he argues that inasmuch as the plaintiffs in the present case did not plead proprietary title when sued in the revenue court the question never was capable of being decided by a revenue court. We think that such construction of the Tenancy Act is quite contrary to the entire policy of the law. We think that when the plaintiffs were sued in the revenue court they were bound under the provisions of section 199 of the Tenancy Act read with section 13 of the Code of Civil Procedure (Act No. XIV of 1882) to put forward as a defence to the suit their plea of proprietary title, and that having failed to do so the matter is *res judicata*, and it is not open to them to raise the question afresh in the present suit. We find that a similar view was taken by a Judge of this Court in the case of *Bihari* v. *Sheobalak* (1). The learned Judge in that case points out the alteration that has been made in the law by section 199 of the Tenancy Act and distinguishes cases arising since the passing of that Act from cases coming under the provisions of Act No. XII of 1881. We allow the appeal, set aside the decrees of the courts below, and dismiss the plaintiffs' suit with costs in all courts including in this court fees on the higher scale.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

1909
February 22

JHUNKU SINGH (DEFENDANT) *v.* CHHOTKAN SINGH AND OTHERS (PLAINTIFFS).*

Usufructuary mortgage—Mortgagee not in possession of a portion of the mortgaged property—Acquiescence of mortgagee in part performance—Stipulation for interest—Redemption without payment of interest.

Where a mortgage-deed provides for payment of interest if "there is any defect *(nuqs)* in the mortgaged property and any manner of defect arise in the mortgagee's possession," *held* that the defect referred to is a defect in the title of the mortgagor whereby the mortgagee should fail to get possession or having got possession should lose it.

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* Second Appeal No. 1389 of 1907 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 7th September 1907, confirming a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 30th July 1906.

(1) (1907) I. L. R., 29 All., 601.

1909

JHUNKU SINGH v. CHHOTKAN SINGH.

Held further that the mortgagee having allowed the mortgagors to retain possession of a part of the mortgaged property and made no claim in respect of the stipulation in the mortgage-deed referred to above his claim for interest is barred by his acquiescence. *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (1) and *Khuda Bakhsh* v. *Alim-un-nissa* (2) referred to.

THE facts of the case are as follows:—

Chahak Bahadur Singh and Harbans Bahadur Singh, plaintiffs, 2nd party, mortgaged with possession the properties in dispute to defendant Jhunku Singh under a mortgage deed, dated 25th August 1888; and subsequently sold their share in mauza Badhia to Chhotkan Singh, plaintiff, 1st party, under a sale deed, dated 23rd June 1905. The plaintiff 1st party deposited the mortgage money in court under section 83, Act IV of 1882, to defendant's account but the latter refused to accept the tender on the ground that he had not obtained possession of a portion of the mortgaged property. A suit was brought for redemption. The Subordinate Judge decreed the plaintiffs' claim. On appeal the District Judge referred the case to the lower court for a finding as to the length of the period of dispossession of the mortgagee. On return of the finding the District Judge relying on the case of *Lachman Das* v. *Baldeo Singh* (3) dismissed the appeal. The defendant appealed.

Hon'ble Pandit *Madan Mohan Malaviya* (with him Babu *Jogendranath Chaudhri*) for the appellant, contended that the lower appellate court having found that the defendant was kept out of possession of more than half of the property for 4 years and 7 months, should have decreed interest to the defendant for that period and that the lower appellate court having held in its order, dated 9th November 1906, that the defendant was entitled to interest, it was not competent to go behind that order. He relied on *Kishun Kuar* v. *Ganga Prasad* (4).

The Hon'ble Pandit *Sundar Lal* (with him Babu *Iswar Saran*) for respondents, relied on *Partab Bahadur* v. *Gajadhar Bakhsh* (1) and *Khuda Bakhsh* v. *Alim-un-nissa* (2).

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for redemption of property the subject of a usufructuary mortgage, dated the 25th of August 1888. The plaintiffs, 2nd

(1) Weekly Notes, 1883, p. 91.
(2) (1908) 6 A. L. J. R., 54.
(3) (1902) L. R., 29 I. A., 148, s. c., I. L. R., 24 All., 521.
(4) (1904) I. L. R., 27 All., 313.

party, who are the mortgagors, sold their interest in the equity of redemption to the plaintiff No. 1 on the 23rd June 1905 and the plaintiff No. 1 deposited the mortgage debt, Rs. 1,800, in court under section 83, Act IV of 1882, to the account of the defendant but the defendant refused to accept the same. The properties mortgaged are 12 bighas of *sir* in Badhia and fractional shares in 5 villages, *viz.* Tirhabir and 4 others. The defendant obtained possession of the *sir* and the share of Tirhabir on the execution of the mortgage, but he did not get possession of the shares in the other villages till April 1893, *i.e.* 4 years and 7 months after the date of the mortgage.

The principal ground upon which the defendant refused to accept the amount deposited in court was that the mortgage deed contained a provision for the payment of interest at the rate of 2 per cent. per mensem if possession of the mortgaged property were not delivered to the mortgagee; and that he did not get possession of portions of the mortgaged property until the month of April 1893, and is, therefore, entitled to interest on the mortgage debt. The court of the first instance decreed the plaintiff's claim and the decision of that court was affirmed by the lower appellate court.

Two grounds of appeal have been pressed before us; the first is that inasmuch as the lower appellate court found that the defendant was kept out of possession of part of the mortgaged property for a period of 4 years and 7 months, it should have decreed portion at least of the interest claimed for that period. The stipulation in the deed provides for payment of interest if "there is any defect (*nuqs*) in the mortgaged property, or any manner of defect arise in the mortgagee's possession." It is not quite clear what these words mean, but we are disposed to think that they refer to a defect in the title of the mortgagor whereby the mortgagees should fail to get possession or having got possession should lose such possession. However this may be, the mortgagees took possession of part of the mortgaged property and raised no objection. They allowed the mortgagors to retain possession of the residue of it and made no claim in respect of the stipulation in the mortgage deed to which we have referred. We are inclined to think that the lower appellate court was right in the

1909

JHUNKU SINGH v. CHHOTHAN SINGH.

reason which it suggested for this. It observes that "apparently the land revenue assessment is comparatively high and neither party was very anxious to pay it." The principle underlying the decision in *Raja Partab Bahadur Singh* v. *Gajadhar Bakhsh* (1) and in the case of *Khuda Bakhsh* v. *Alim-un-nissa* (2) seems to us to be applicable to this case. The mortgagee's claim for interest is barred by his acquiescence. On this ground the appeal in our opinion fails. The only other contention raised was that the lower appellate court, in an order of the 9th November 1906, by which an issue was referred for determination to the court of first instance, stated that the mortgagee was entitled to interest for the period of his dispossession. It is contended that having expressed this view the learned Judge was not justified afterwards in dismissing the mortgagee's claim for interest. We cannot accede to this contention, but assuming that the lower appellate court was not justified in the course it adopted, the respondents are entitled now to support the decree of that court on the ground that the mortgagee having acquiesced in the mortgagor's remaining in possession of portion of the mortgaged property, cannot succeed in his claim for interest.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

1909
February 27.

MISCELLANEOUS CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

RAM DHANI SAHU (APPLICANT) AND LALIT SINGH AND OTHERS (OPPOSITE PARTIES). *

Act No. IV of 1882—(*Transfer of Property Act*), *sections* 92, 93—*Application for enlargement of time—Application to be made to the court of first instance, not to an appellate court.*

An application under section 93, Transfer of Property Act, 1882, for extension of the time for payment of mortgage money in a decree passed under section 92 of that Act by an appellate court must be made to the court of first instance

* Civil Miscellaneous No. 300 of 1908.

(1) (1902) L. R., 21 I. A., 148; S. C., I. L. R., 24 All., 521.

(2) (1901) I. L. R., 27 All., 313.

Sheo Narain v. *Chunni Lal* (1) followed; *Babu Prasad* v. *Khiali Ram* (2) dissented from.

THIS was an application for extension of the time fixed for payment of mortgage money under an appellate decree of the High Court.

Munshi *Haribans Sahai*, for the respondent, raised a preliminary objection to the hearing of the application on the ground that the High Court had no jurisdiction to entertain the application. The court of first instance was the proper court to which the application should have been made. He relied on *Sheo Narain* v. *Chunni Lal* (1).

Munshi *Girdhari Lal Agarwala*, for the applicant, cited the case of *Babu Prasad* v. *Khiali Ram* (2), in support of the contention that in a case in which there had been an appeal, an application for enlargement of time could be entertained by an appellate court as well as a court of first instance.

STANLEY, C. J. and BANERJI, J.—This is an application by Ramdhani Sahu, the appellant, for an extension of the time fixed by this court for payment of a mortgage debt under a decree of the 23rd of July 1908. By that decree the appellant was directed to pay a prior mortgage on or before the 5th of November 1908. Owing to delay in obtaining a copy of the judgment, the date which was so fixed was allowed to pass over without payment. The present application is now made to this Court to extend the time for payment.

A preliminary objection is raised to the application to the effect that the proper court to which this application should be made is the court of first instance. We think that this preliminary objection is well-founded. The question as to the proper court to which such an application should be presented was considered by a Bench of this Court, of which one of us was a member, in the case of *Sheo Narain* v. *Chunni Lal* (1). In the judgment in that case the authorities are reviewed and the language of section 92 of the Transfer of Property Act considered, with the result that the Court came to the conclusion that a preliminary objection similar to the one now put forward was bound to prevail; that when a decree for redemption under

(1) (1900) I. L. R., 23 All., 83. (2) Weekly Notes, 1905, p. 23.

1909

RAM DHANI SAHU v. LALIT SINGH.

section 92 of the Transfer of Property Act, 1882, has been made by an appellate court, an application under the last paragraph of section 93 must be made not to that court but to the court of first instance. It is pointed out to us that this ruling was not followed by our brother RICHARDS in the case of *Babu Prasad* v. *Khiali Ram* (1). Our learned brother in that case held that although the court of first instance was the proper court for dealing with applications of the kind yet the appellate court had jurisdiction also to allow an enlargement of time in cases in which there had been appeals. We are unable to agree in the view expressed by our learned brother. We are of opinion that the earlier ruling is correct. We therefore allow the preliminary objection but we do not express any opinion as to the merits of the application. It is stated that the money payable to the prior mortgagee has actually been paid and a receipt therefore obtained. Under these circumstances there will possibly be little difficulty in obtaining an extension of time from the proper court.

We dismissed the application, but under the circumstances, without costs.

Application rejected.

APPELLATE CIVIL.

1909
March 3.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

NARAIN DASS (DEFENDANT) v. BHUP NARAIN AND ANOTHER (PLAINTIFFS).*

Act (local) No. III of 1901 (*Land Revenue Act*), *section* 233 (*k*)—*Suit for partition of* Dera *and site—Civil and Revenue Courts—Jurisdiction.*

In a suit for partition of a *Dera* standing on agricultural land situate in a [illegible] held that though the suit was in [illegible]

[illegible]

Land Revenue Act.

THE facts of this case are as follows:—

In 1867 the village Sarkara was divided into two *mahals*, *mahal Surkh* and *mahal Multani*. The plaintiffs and the defendants,

*First Appeal No 101 of 1909 from an order of Girraj Kishore Dutt, Subordinate Judge of Bareilly, dated the 16th of July 1908.

(1) Weekly Notes, 1903, p. 203.

are joint owners of *mahal Surkh*, but *mahal Multani* is exclusively owned by the defendants. When the Revenue Court partitioned the village in 1867, the site on which the house in dispute stands was allotted in its entirety to *mahal Multani*. The house, however, which is known as a *Dera* is in the joint possession of all the proprietors of the village. The plaintiffs on the strength of that possession brought this suit for partition of the house and for separate possession of a share therein to the extent of their share in the village. The court of first instance dismissed the suit holding that the plaintiffs were not the owners of the site of house and that they, therefore, could not get partition and separate possession of the site of the *Dera* now in dispute. On appeal the Subordinate Judge reversed the finding of the court of first instance and remanded the case. The defendants appealed to the High Court.

Babu *Sital Prasad Ghose* for the appellants, contended that the plaintiffs not being owners of the site of the house admittedly situate in *mahal Multani* which was exclusively owned by the defendants, could not claim partition and separate possession of a portion thereof. If the plaintiffs or their predecessors had any share in the site of the house they ought to have raised this objection at the time of partition before the Revenue Court. They are now barred by section 233 (*k*) of the Land Revenue Act (III of 1901) from raising any such objection. He relied on *Kalika Prasad Tewari and others* v. *Naresh Dutt Tewari*(1)

Munshi *Gobind Prasad*, for the respondents relied on *Abdul Rahman* v. *Mashini Bibi* (2); *Iswar Prashad* v. *Jagannath Singh* (3).

KNOX, and GRIFFIN, JJ.—The order under appeal is an order passed by the Subordinate Judge of Bareilly whereby reversing the decree of the lower court he remanded the case to that court to be replaced on its original number on the file of that court and to be disposed of according to law. The order continues, "The lower court will pass a final decree in the plaintiff's favour for separate possession by partition." The plaintiff's claim a five-ninth share in the property in dispute which is called a *dera*

(1) S. A. No. 1145 of 1903, decided on the 4th of March, 1908.
(2) Weekly Notes, 1893 p. 49.
(3) Weekly Notes, 1903, p. 124.

1909

NARAIN DASS v. BHUP NARAIN.

situate in an agricultural village. They admit that the site upon which the *dera* stands is situate in a *mahal* of the village called *mahal Multani* in which they have no share. They themselves are owners of property in a *mahal* of the village known as *mahal Surkh*. When the Revenue Courts partitioned the village in 1867, the site on which the *dera* stands was allotted in its entirety to *mahal* Multani. The title of the plaintiffs rests partly upon inheritance from certain persons who were proprietors in possession of the *dera*, partly upon purchase. They say that they have repeatedly asked the defendant to partition the *dera* and to give them possession over their share. As the defendant refuses to accede to this request they have brought the present suit for partition of their share in the *dera* and for exclusive possession over it. The defence, amongst other grounds, with which we are not concerned, raises the question that plaintiffs cannot ask for partition of the *dera*, but might ask for the rent of that portion of it which is occupied by the defendant. The court of first instance, holding that the claim was virtually one for partition and separate possession of the site of the *dera* in suit and that it was unmaintainable, dismissed the suit. The lower appellate court found that as the plaintiffs were owners of a portion of the house in dispute they were entitled to separate possession of their share of the house by partition and the mere fact that the defendant was owner of the site of the house cannot defeat the plaintiffs' rights to claim partition of the building itself. The defendant appeals from this order and his plea is that the plaintiffs are not owners of the site of the house which is situate in a *mahal* exclusively owned by him and the plaintiffs are not entitled to claim partition of the house in dispute. On behalf of the respondents our attention was called to the cases of *Abdul Rahman* v. *Mashina Bibi* (1), and *Iswar Parshad* v. *Jagarnath Singh and others* (2). In the first of these two cases it was held that it was not within the jurisdiction of a Court of Revenue to partition a 'chhauni' or collection house. The second case was a case in which the parties were co-sharers in the village and while the village remained undivided the defendants had erected a building. On

(1) Weekly Notes, 1899, p. 49. (2) Weekly Notes, 1906, p. 194.

partition the revenue authorities allotted the plot on which the building stood to the share of the second party the plaintiffs. The plaintiffs sued for demolition of the building and for recovery of possession of what they deemed to be their share of the land covered by the defendants' building. It was held that the suit for demolition was bad, but that it was still open to the plaintiffs to ask the Revenue authorities to assess ground rent on the premises occupied by the defendants. Neither of these two cases is on all fours with the present case. The suit as it stands, though in name a suit for partition of the building, is in reality a suit also for partition of the land on which that building stands. It is a matter which arises on partition and which should be dealt with by the Revenue Courts. In our opinion section 233, clause (*k*), forbids the Civil Court exercising jurisdiction over a suit of the form in which this one has been brought. We decree the appeal, set aside the decree of the court below, and restore that of the court of first instance with costs.

Appeal decreed.

1909

NARAIN DASS v. BHUP NARAIN.

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji.

MUSAMMAT DHUMAN (DEFENDANT) v SYED ABDULLAH KHAN, (PLAINTIFF).*

1909 March 12.

Torts—Malicious prosecution—Amount of damages—Second appeal.

In a suit for damages for malicious prosecution the question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon such a question. *Bane Madhab Chatterjee* v. *Bhola Nath Banerjee* (1), and *Jageswar Sarma* v. *Dina Ram Surma* (2) referred to.

THE facts of this case are as follows:—

Musammat Dhuman, the appellant, filed a criminal complaint against the respondent Nawab Abdulla Khan charging him with stealing the ornaments which had been on the person of a girl named Shirin Jan and which it was alleged belonged to the appellant. She also complained that Nawab Abdullah Khan had wrongfully confined that girl and a maid-servant. The complaint was dismissed by the criminal court. Nawab

*Second Appeal No. 23[illegible] of 1908 from a decree of H. E. Holme, District Judge of Jhansi, dated the 23rd December 1907, confirming a decree of Pramatha Nath Banerji, Subordinate Judge of Jhansi, dated the 21st August 1907.

(1) (1868) 10 W. R., 164. (2) (1906) 3 C. L. J. 340.

1909

MUSAMMAT DHUMAN v. SYED ABDULLAH KHAN.

Abdullah Khan thereupon brought the suit, which gave rise to this appeal, for damages for malicious prosecution. Both the lower courts found that the complaint filed by Musammat Dhuman was false to her knowledge and malicious and awarded Rs. 700 as damages.

Babu *Sital Prasad Ghosh*, for the appellant, contended that the amount of damages awarded was excessive.

Dr. *Satish Chandra Banerji*, (for whom Babu *Jagabandhu Phani*) for the respondent submitted that the question as to the *amount* of damages was one of fact and could not be raised in second appeal. *Banee Madhub* v. *Bhola Nath* (1). *Jogeswar Sarma* v. *Dinaram Sarma* (2). *Joharuddin* v. *Dabee Pershad* (3).

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for damages for malicious prosecution. It appears that the appellant filed a complaint against the respondent charging him with having stolen the ornaments which were on the person of a girl named Shirin Jan who eloped with the son of the respondent. She also complained that the plaintiff had wrongfully confined that girl and a maid-servant and she applied for the search of the plaintiff's house which was accordingly searched. The complaint was found by the criminal court to be unfounded and was dismissed. In this case the plaintiff sought to recover Rs. 500 as damages for loss of reputation and Rs. 499 as damages for mental and physical suffering. The Court of first instance made a decree in the plaintiff's favour for Rs. 700 and this decree has been affirmed by the lower appellate court. Both the courts have found that the complaint made by the appellant, which in her defence to the present suit she asserted to be true, was false and malicious and without reasonable and probable cause. That finding is based upon legal evidence and we are not satisfied that it is erroneous. The only question which remains therefore is that of damages. If we had to decide that question ourselves, we should certainly hold that the amount awarded was excessive, but it has been held by the Calcutta High Court in *Banee Madhab Chatterjee*

(1) (1868) 10 W. R. 164. (2) (1893) 3 C. L. J., 340.
(3) (1870) 13 W. R., 22.

1909

MUSAMMAT DHUMAN v. SYED ABDULLAH KHAN

v. *Bhola Nath Banerjee* (1) and *Jageswar Sarma* v. *Dinaram Sarma* (2) that the question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon such a question. We are not prepared to dissent from the view held in those cases, and accordingly dismiss the appeal with costs.

Appeal dismissed.

1909
March 12.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

HAMIDA BIBI AND ANOTHER (PLAINTIFFS) *v.* AHMAD HUSAIN (DEFENDANT) *

Act No. IV of 1882 (Transfer of Property Act), section 60—Inheritance of mortgagor's rights by mortgagee—Integrity of the mortgage broken up.

Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee whether by purchase or by inheritance or otherwise there is a merger of rights and the integrity of the mortgage is broken up.

H mortgaged certain property to *B* who transferred his mortgagee right to *M*. *M* died leaving *A* as his sole heir. *H* died leaving 51 heirs one of whom was *A*. Some heirs of *H* brought this suit for redemption of their shares only. *Held* that the plaintiffs were entitled to redeem their shares inasmuch as the mortgagee having inherited part of the property mortgaged the integrity of the mortgage was broken up. *Lachmi Narain* v. *Muhammad Yusuf* (3) distinguished. *Sobha Sah* v. *Inderjeet* (4), followed. *Azimat Ali Khan* v. *Jowahir Singh* (5), *Kallan Khan* v. *Mardan Khan* (6), *Munshi* v. *Daulat* (7) referred to.

THIS was a suit for redemption of a usufructuary mortgage executed by one Hafiz in the year 1858 in favour of one Babu Lal. Babu Lal transferred his mortgagee rights to one Ahmad Kareem in 1875. The plaintiff is one of the fifty-one surviving heirs of the original mortgagor. The defendant Ahmad Husain is also one of the heirs of the mortgagor but he has also succeeded by right of inheritance to the mortgagee rights of Ahmad Kareem as his sole heir. The plaintiff brought this suit for redemption of her share in the mortgaged property on payment of a proportionate amount of the mortgage money. The defence was that the plaintiff could not redeem her own share only in the mortgaged property. Both the courts below

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* Appeal No. 80 of 1908 under section 10 of the Letters Patent.

(1) (1868) 10 W.R., 164.
(2) (1898) 3 C. L. J., 340.
(3) (1894) I. L. R., 17 All., 63.
(4) (1873) 5 N. W. P., 148.
(5) (1870) 13 M. I. A., 404.
(6) (1905) I. L. R., 28 All., 155.
(7) (1903) I. L. R., 29 All., 262.

1909

HAMIDA BIBI v. AHMAD HUSAIN.

decreed the plaintiff's suit. The defendants preferred a second appeal to the High Court, which was decreed by GRIFFIN, J.

The plaintiffs appealed under section 10 of the Letters Patent.

Mr. *M. L. Agarwala*, for the appellant, submitted that as the defendant, who represented the mortgagee, had acquired, as one of the heirs of the mortgagor, a share of the rights of the latter, the plaintiffs had a right under section 60 of the Transfer of Property Act to redeem their own shares only. The word "acquire" used in section 60 of the said Act was a general word and included acquisition by inheritance. He relied on *Kallu Khan* v. *Mardan Khan* (1), and *Munshi* v. *Daulat* (2).

Maulvi *Muhammad Rahmatullah*, for the respondent, submitted that the exception to the general rule laid down in section 60 of the Transfer of Property Act would not apply to the present case. When the mortgagee acquired the interests of one of the mortgagors the integrity of the mortgage was broken up; and therefore the law allowed other mortgagors to redeem their own shares. That was the principle of the exception laid down in section 60. That principle did not apply to a case, like the present where the mortgagor acquired the rights of a mortgagee. Ghose's Law of Mortgage, 3rd Edition, pages 305 and 306. The fact that one of the mortgagors acquired the rights of the mortgagee by inheritance did not break up the integrity of the mortgage. The object of section 60 was to protect the original mortgagors and mortgagees and it did not take into account the legal incidents that might follow. It had been held that even where the mortgagee allowed the mortgagor to pay a portion of the mortgage debt and released a proportionate part of the property, the mortgagor or his representative was not entitled to redeem the rest of the mortgaged property piecemeal. He cited *Lachmi Narain* v. *Muhammad Yusuf*, (3), Ghose: *Law of Mortgage*, 3rd Edition, pages 310 and 311, *Salig Ram Singh* v. *Barun Rai* (4), and *Narayan* v. *Ganpat* (5).

STANLEY, C. J, and BANERJI J.—This appeal arises out of a suit for the redemption of a mortgage made in 1858 by one Hafiz

(1) (1905) I. L. R., 28 All., 155.
(2) (1906) I. L. R., 29 All., 262.
(3) (1894) I. L. R., 17 All., 63.
(4) (1872) N.-W. P. H. C., Rep., 92
(5) (1896) I. L. R., 21 Bom., 619, 626.

Baksh in favour of Babu Lal. The latter transferred his rights as mortgagee to one Muhammad Karim whose sole representative, by right of inheritance, is the respondent Ahmad Husain. The mortgagor Hafiz Baksh died leaving several heirs among whom are the defendant Ahmad Husain and the plaintiffs. The plaintiffs seek to redeem their own share of the property on payment of a proportionate part of the mortgage money. The defendant's contention was that the plaintiffs could only redeem the mortgage as a whole and were not entitled to claim redemption of their own share only. The court of first instance overruled this objection and decreed the claim on the ground that the integrity of the mortgage was broken up by reason of the defendant having inherited a part of the mortgagor's right. The lower appellate court having affirmed this decree a second appeal was preferred to this Court by the defendant. Our learned colleague who heard the appeal was of opinion that the suit as framed was not maintainable and dismissed it From his judgment this appeal has been preferred under the Letters Patent.

The learned counsel for the appellants urges that as the defendant, who represents the mortgagee, has acquired in part the share of the mortgagor, the appellants have the right under section 60 of the Transfer of Property Act to redeem their own share only. In our judgment this contention is well founded. Section 60 provides, in its last paragraph, that nothing in the section "shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor." This provision gives legislative effect to the well-known rule that when a portion of the mortgaged property becomes vested in the mortgagee himself the mortgage security is broken up and one of the mortgagors or his representative becomes entitled to redeem his share on payment only of that portion of the mortgage debt which is attributable to that share. Our learned colleague, after referring to the above provision, observes: "The cases on the point appear to me to proceed on the principle that where a mortgagee has by his act recognized

1909

MURARI LAL
v.
KUNDAN LAL.

Sukhi, widow of Sant Lal, was to be '*Malik*' of all the property. The will then set out that Musammat Sukhi had adopted Kundan Lal, who was Sant Lal's daughter's son, and that on the death of Musammat Sukhi, Kundan Lal was to succeed her. Hargu Lal died on 26th August 1898, and Musammat Sukhi died on the 27th May 1899. The defendants claiming to have got the property by gift from Sukhi took possession of it. Thereupon the plaintiff Kundan Lal brought the present suit for ejectment on the basis of the will of Hargu Lal. The court of first instance held that the will was proved and that under the will, Musammat Sukhi took a life estate only and after her death Kundan Lal was entitled to succeed, although his adoption was not valid, inasmuch as the bequest in his favour was not conditional on his being adopted. The lower appellate court confirmed the decree.

The material paragraphs of the will were as follows:—

That after my death, Musammat Sukhi, wife of Sant Lal aforesaid, shall remain '*Malik*, of all my property . . . , and no one else shall become so (*Malik*).

That Musammat Sukhi aforesaid, with the consent of me the executant, adopted her daughter's son Kundan Lal son of Kewal Ram . . . during the life-time of her husband, Sant Lal, and has performed all ceremonies observed in the brotherhood. After the death of Musammat Sukhi aforesaid, Kundan Lal aforesaid shall become '*malik*' and '*kabiz*' of all the property and nobody else shall have any claim. But after his death, his mother Musammat Basso, daughter of Sant Lal . . . . will be '*malik*' and '*kabiz*' of all the property.

The defendants appealed to the High Court.

Dr. *Satish Chandra Banerji* (with him Pandit *Moti Lal Nehru*), for the appellants, contended that Hargu Lal had executed a previous will in favour of Sant Lal and in the last will the only change he purported to make was to substitute Musammat Sukhi as the legatee. She was to be the '*Malik*', that is, absolute owner. The meaning of the word '*Malik*' has been definitely settled by the Privy Council. *Surajmani* v. *Rabinath Ojha* (1). The bequest was to Kundan Lal as the adopted son of Musammat Sukkhi and Sant Lal. Kundan Lal would therefore only succeed if he were and could be validly adopted. Being a daughter's son he could not be adopted and as the adoption was the motive and the condition of the bequest, the adoption being invalid, the bequest was inoperative. He cited

(1) (1907) I. L. R., 30 All., 84; P. C

Fanindra Deb Raikat v. *Rajeswar Dass* (1), *Surendra Keshab Roy* v. *Durgasoondery Dossee* (2), *Karamsi Mashonji* v. *Karparndass Natha* (3), *Lali* v. *Murlidhar* (4).

Hon'ble Pandit *Madan Mohan Malaviya*, for the respondent, was not called upon.

RICHARDS and KARAMAT HUSAIN, JJ.—This was a suit to recover possession of certain shops. The plaintiff claims under a will of one Hargu Lal. The defendants are the persons who would have succeeded to the property but for the will. Hargu Lal had one son named Sant Lal, who predeceased him leaving a widow, Musammat Sukhi. Musammat Sukhi had four daughters, Musammat Sendho, Musammat Gendu, Musammat Chuna and Musammat Baso. The plaintiff is the son of Musammat Baso. The will is dated the 12th of April 1898, and it commences by reciting that the testator had made a will in favour of Sant Lal. It then goes on to say that all his property, moveable and immoveable, is to remain his own during his life and that afterwards Musammat Sukhi was to be the *malik* of all property. It then sets out that Musammat Sukhi has adopted Kundan Lal with his approval with all due formalities and that on the death of Musammat Sukhi Kundan Lal will succeed her. After the death of Kundan Lal Musammat Baso was to succeed. The will then concludes with special directions that neither Musammat Pari, daughter of the testator, nor any of his son's daughters, were to have any right whatever. It is admitted that Kundan Lal being a daughter's son could not under the Hindu law be adopted as a son of Sant Lal. The appellants contend that upon a true construction of the will the reason or motive of the gift to Kundan Lal was that he had been adopted. This is the only question that has been seriously pressed in this appeal. We think that the decision of the court below was correct. The testator for reasons which he gives expressly excluded from sharing in his property the persons who would have taken if there had been no will. Kundan Lal was the testator's sole male descendant. A number of cases have been cited to us including the passage from

(1) (1885) I. L. R., 11 Calc., 463, P. C.
(2) (1891) I. L. R., 19 Calc., 513, P. C.
(3) (1898) I. L. R., 23 Bom., 271, P.C.
(4) (1906) I. L. R., 28 All., 488, P. C.

1909

ABDUL LATIF KHAN
v.
NIYAZ AHMAD KHAN.

consummated. Out of this sum of Rs 10,000, half devolved on the husband and the other half was claimed by the plaintiffs. The defendant pleaded that the dower settled at the time of marriage was only Rs. 150 and further that he was induced to marry Musammat Akbari on the misrepresentation that she was in sound health, while as a matter of fact she was seriously ill. The Court of first instance held that at the time of the marriage Musammat Akbari had been suffering from serious illness and that therefore according to the Hanafi law, to which the parties were subject, the marriage was void. On appeal, the District Judge held that the case was governed by the Contract Act and as there was fraud practised upon the husband the suit was not maintainable.

The plaintiffs appealed to the High Court.

Babu *Durga Charan Banerji* (for whom Maulvi *Ghulam Mujtaba*).

The law applicable to marriage and dower was the Muhammadan law; as the parties were *Sunnis* it had to be decided whether under the *Sunni* law the marriage was void. According to that law, the illness of the wife does not invalidate the marriage. Baillie, Muhammadan Law, pages 96 and 102. A. F. Abdul Rahman's Institutes of Muhammadan Law, page 52, Article 81. The passage quoted by the District Judge from Amir Ali's Muhammadan Law, Vol. II, p. 326, does not apply to *Sunnis*. Mr. Ameer Ali quoted no authority for the proposition that the *Shia* and *Sunni* laws on this point were the same. There was no direct authority in favour of the proposition that marriage is invalid even if procured by fraud and the Contract Act would not apply.

According to the Bengal and North-Western Provinces Civil Courts Act, the Muhammadan Law only would be applicable in questions of marriage and dower.

Mr. *M. L. Agarwala*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit brought by two of the legal representatives of one Musammat Akbari, deceased, for a portion of her alleged dower. Musammat Akbari was married to the defendant on the 5th of February 1906. She died on the 28th of December 1906, before

consummation of the marriage. The plaintiff states that the amount of her dower was Rs. 20,000, that as the marriage was not consummated only one half of that amount is payable by the husband, and that the plaintiffs are entitled to a half of that half, namely to Rs. 5,000. This sum the plaintiffs seek to recover in this suit. The Court of first instance dismissed the suit and the decree of that court was affirmed by the lower appellate court. It has been found by the learned Judge that at the time of her marriage Musammat Akbari was suffering from a serious illness which prevented consummation of the marriage and that she died of that illness. It has also been found that the defendant, her husband, was not aware that she was suffering from that illness at the time of the marriage, and that the fact of the illness was suppressed by the father of the girl. On these findings the learned Judge has come to the conclusion that the consent of the husband was obtained by fraud. As according to the finding of the court below, there was an active concealment of a fact which should have been brought to the notice of the husband in order to obtain his free consent to the marriage, a fraud was perpetrated on him at the time of the marriage. It is stated in Mr. Amir Ali's work on Muhammadan Law, Vol. II, p. 326, on the authority of the *Raddul Mukhtar* that "when consent to a contract of marriage has been obtained by force or fraud such marriage is invalid unless ratified." He also lays down on the same page that "a marriage contracted by a sick person is dependent on consummation, so that if he die of that illness without consummation, the contract is void and the woman has no right to dower or succession." The authority for this view is the *Sharaya*, which is an authority on *Shia* law, by which the parties to this case are not governed. But Mr. Amir Ali also says on the same page that, "it is needless to add that there is very little difference on these points between the *Shias* and the *Sunnis*." The learned vakil for the appellant contends that this is the learned author's own view only and that he has cited no authority in support of it. The learned vakil however has not been able to refer us to any authority which would justify us in coming to a different conclusion. He relies on the following passage on page 405 of the same work: "If the wife however was suffering from

1909

ABDUL LATIF KHAN
v.
NIYAZ AHMED KHAN.

some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs," and contends that this is inconsistent with the opinon expressed on page 326 as quoted above. We do not think this is so. What is referred to on page 405 is the case of a valid marriage, where there has been no fraud or coercion. As we have pointed out above, if a marriage was procured by fraud it is invalid. In this case according to the finding of the court below the marriage of the defendant with the deceased Musammat Akbari was the result of a fraud perpetrated upon him, and therefore it was an invalid marriage. It necessarily follows that the defendant was not liable to pay the dower of the deceased and the plaintiff's suit has been rightly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

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Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ... ... 6 *a.* (1 *a.*)

Act XI of 1886 (Tramways), as modified up to 1st December, 1903 ... 9 *a.* (2 *a.*)

Act XIII of 1886 (Securities), as amended by Act X [illegible] 1891 ... ... 2 *a.* 9 *p.* (1 *a.*)

Act VII of 1887 (Suits Valuation), as modified up [illegible] [illegible]ober, 1891 ... 1 *a.* 9 *p* (1 *a*)

Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... 8 a. (1 a.)

Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... 8 a. (1 a.)

Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ... 9 a. (2 a.)

Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 a. 9 p. (1 a.)

Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... 5 a. 6 p. (1 a.)

Act X of 1889 (Ports), as modified up to 1st April, 1901 ... 11 a. (2 a.)

Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ... 7 a. (1 a.)

Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... 3 a. (1 a.)

Act IX of 1890 (Railways), as modified up to 1st June, 1905, with an Index ... Re. 1-2. (2 a.)

Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ... 2 a. 3 p. (1 a.)

Act XII of 1891 (Repealing and Amending Act), shewing the schedules as modified up to 31st May, 1902 ... *12 a. (1 a. 6 p.)*

Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... *1 a. 3 p. (1 a.)*

Act I of 1894 (Land Acquisition), with footnotes ... *7 a. (1 a.)*

Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ... *9 a. (2 a.)*

Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... *7 a. 6 p. (1 a. 6 p.)*

Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... *1 a. 6 p. (1 a.)*

Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1903 ... Rs. 3-10. (8 a.)

Act VIII of 1899 (Petroleum), as modified up to 1st December, 1904 ... *7 a. (1 a.)*

Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... *1 a. (1 a)*

Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ... *6 a 6 p. (1 a.)*

Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... *5 a 6 p (1 a)*

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... *6 a. 6 p. (1 a.)*

Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... *1 a. 9 p. (1 a)*

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... *5 a. 6 p. (1 a)*

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 ... *13 a (2 a.)*

Regulation VI of 1886 (Ajmer Rural Boards) as modified up to 1st February, 1897 ... *5 a. 6 p. (1 a)*

Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891 ... *6 a. (1 a)*

Regulation V of 1893 (Sonthal *Parganas Justice*), as modified up to 1st October, 1899 ... *4 a. 9 p (1 a.)*

Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st *April*, 1902 ... *6 a (1 a)*

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COU AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council *from* 1834 to 1903. 8vo. Stitched

Regulations made under the Statute 30 Vict., Cap. 3, from No II of 1875 to 1903. *The price is noted on each*]

[The above may be obtained separately.

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERA OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1901 ... In Urdu *1 a. 6 p.*

Act XX of 1847 (Copyright), as modified up to 1st May, 1896, with foot-notes brought down to 1st December, 1903 ... In Urdu. *1 a. 3 p.*

Act XX of 1847 Copyright as modified up to 1st May, 1896 ...	... In Nagri. 1 a. 3 p. (1 a.)
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	... In Urdu. 6 p (1 a.)
Ditto ditto ...	... In Nagri. 6 p. (1 a.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 ...	In Urdu. 6 p. (1 a.)
Ditto ditto	... In Nagri. 6 p. (1 a.)
Act XXX of 1852 (Naturalisation), as modified up to 1st December, 1902 ...	In Urdu 6 p. (1 a)
Ditto ditto	... In Nagri. 6 p. (1 a.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	... In Urdu. 3 p. (1 a.)
Ditto ditto	... In Nagri. 3 p (1 a)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903...	In Urdu. 6 p. (1 a.)
Ditto ditto	... In Nagri 6 p. (1 a)
Act XX of 1856, as modified up to 1st November, 1903 ...	. In Urdu. 2 a 6 p. (1 a.)
Ditto ditto	... In Nagri. 2 a. 6 p. (1 a)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	... In Urdu. 1 a (1 a.)
Ditto ditto	.. In Nagri. 1 a. (1. a.)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	.. In Urdu. 1 a (1. a.)
Ditto ditto	... In Nagri. 1. a. (1 a)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 ..	In Urdu. 1 a. 6 p. (1 a.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	... In Urdu. 3 p. (1 a)
Ditto ditto	... In Nagri. 3 p. (1 a)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	... In Urdu. 3 p. (1 a)
Ditto ditto	... In Nagri. 3 p. (1 a.)
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	... In Urdu. Re. 1-5 (5 a.)
Ditto ditto	... In Nagri. Re. 1-5 (5 a)
Act V of 1861 (Police), as modified up to 7th March, 1903 ...	... In Urdu. 2 a. 9 p. (1 a.)
Ditto ditto	... In Nagri. 2 a 9 p. (1 a.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898 ...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto	... In Nagri. 1 a. 3 p. (1. a.
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	... In Urdu. 1 a. (1 a)
Ditto ditto	... In Nagri. 1 a (1 a.)
Act VI of 1864 (Whipping), as modified up to 1st April, 1900	... In Urdu. 1 a. 6 p. (1 a.)
Ditto ditto .	... In Nagri 1 a. 6 p. (1 a.)
Act III of 1865 (Carriers) as modified up to 31st May, 1903	... In Urdu. 9 p. (1 a).
Ditto ditto	... In Nagri. 9 p. (1 a)
Act III of 1867 (Gambling), as modified to 1st December, 1896	... In Nagri. 2 a. (1 a.)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1893	... In English, Urdu, and Nagri. Bound Rs. 3 (5 a.)
Ditto ditto	... Unbound. Rs. 2-8. (5 a)
Act VII of 1870 (Court-fees), as modified up to 1st December, 1896	... In Urdu. 8 a. 3 p (2 a 6 p)
Ditto as modified up to 1st October, 1899	... In Nagri. 8 a 9 p. (1 a)
Act I of 1871 (Cattle trespass) as modified up to 1st December, 1903	... In Urdu. 1 a. 9 p. (1 a)
Ditto ditto	... In Nagri. 1 a. 9 p. (1 a)
Act XXIII of 1871 (Pensions)	... In Urdu. 9 p (1 a.)
Ditto	... In Hindi. 9 p. (1 a.)
Act I of 1872 (Evidence), as modified up to 1st May, 1903 ..	... In Urdu. 8 a. (2 a.)
Ditto ditto ...	... In Nagri. 8 a. (2 a)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	... In Urdu 2 a. 6 p (1 a. 6 p)
Act IX of 1872 (Contract), as modified up to 1st September, 1899	... In Urdu. 9 a. 9 p. (3 a)

Act IX of 1872 (Contract), as modified up to 1st September, 1899 ... In Nagri. 9 a. 6 p. (3 a

Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ... In Urdu. 4 a. (2 a)

Ditto ditto ... In Nagri. 4 a. (2 a)

Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 In Urdu. 9 p. (1 a)

Ditto ditto ... In Nagri 9 p. (1 a)

Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899 ... In Urdu 3 a. 3 p. (1 a)

Ditto ditto . In Nagri. 3 a. 3 p. (1 a)

Act X of 1873 (Oaths), as modified up to 1st February, 1903 . In Urdu 9 p. (1 a)

Ditto ditto .. In Nagri 1 a. (1 a)

Act IX of 1875 (Majority), as modified up to 1st May, 1906 . In Urdu. 3 p. (1 a)

Ditto ditto .. In Nagri. 3 p. (1 a)

Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 . In Urdu 1 a. 9 p. (1 a. 6 p.)

Ditto ditto ... In Nagri. 4 a. 3 p. (1 a. 6 p.)

Act III 1877 (Registration), as modified up to 1st December, 1896 ... In Urdu. 4 a. 3 p. (2 a)

Ditto ditto ... In Nagri 4 a. 6 p. (2 a)

Act I of 1878 (Opium), as modified up to 1st December, 1898 ... In Nagri 1 a. 6 p. (1 a)

Act VII of 1878 (Forests), as modified up to 1st December 1903 ... In Urdu. 4 a. (1 a. 6 p.)

Ditto ditto .. In Nagri. 3 a. 9 p. (1 a. 6 p.)

Act XI of 1878 (Arms), as modified up to 1st May, 1904 ... In Urdu. (2 a. (1 a.)

Ditto ditto ... In Nagri. 2 a. (1 a)

Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902 In Urdu. 2 a. (1 a)

Ditto ditto ... In Nagri. 2 a. (1 a)

Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 In Urdu. 2 a. 6 p. (1 a)

Ditto ditto ... In Nagri. 2 a. 6 p. (1 a)

Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... In Urdu 1 a. 6 p. (1 a)

Ditto ditto ... In Nagri. 1 a. 6 p. (1 a)

Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898 .. In Urdu. 9 a. (1 a. 6 p.)

Ditto ditto ... In Nagri. 9 a. (1 a. 6 p.)

[illegible] Property), as modified up to 1st March, 1900 ... In Urdu. 6 a. 9 p. (2 a)

[illegible] ... In Nagri. 6 a. 9 p. (3 a.)

[illegible] modified up to 1st [illegible] In Urdu 13 a. 9 p. (3 a.)

[illegible] .. In Nagri. 14 a. (3 a)

[illegible] up to 1st December [illegible] .. In Urdu. Re 1-4. (6 a)

[illegible] Loans), as modified up to 1st Sep- [illegible] ... In Urdu. 1 a. (1 a.)

Ditto ditto ... In Nagri. 1 a. (1 a.)

Act XXI of 1883 [illegible], as modified up to 1st December, 1902 .. In Urdu. 4 a. 9 p. (1 a. 6 p.)

Ditto ditto .. In Nagri. 4 a. 6 p. (1 a. 6 p.)

Act IV of 1884 (Explosives), as modified up to 1st May, 1890 ... In Urdu. 1 a. 3 p. (1 a)

Ditto ditto .. In Nagri. 1 a. 3 p. (1 a.)

Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ... In Urdu. 3 a. 6 p. (1 a. 6 p.)

Ditto ditto ... In Nagri. 3 a. 6 p. (1 a. 6 p.)

Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1906 In Urdu. 6 p. (1 a.)

Ditto ditto ... In Nagri. 6 p. (1 a.)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 18.9... In Urdu. 2 a. 6 p. (1 a.)

Act II of 1885 (Negotiable Instruments Amendment). ... In Urdu. 9 p. (1 a)

Act III of 1885 (Transfer of Property Amendment) ... ... In Urdu. 3 p. (1 a)

Act X of 1885 (Oudh Estates Amendment) ... ... In Urdu. 3 p. (1 a.)

Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1903 ... In Urdu. 1 a. 6 p. (1 a)

Act XXI of 1885 (Madras Civil Courts Amendment) ... ... In Urdu 3 p. (1 a)

Act	Price
Act II of 1886 (Income tax), as modified up to 1st April, 1903	In Urdu. 3 a. (1 a. 9 p.)
Ditto ditto ...	In Nagri 3 a. (3 a. 9 p.)
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu 3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu. 1 a. 3 p. (1 a.)
Act VII of 1886 (Registration Amendments)	In Urdu. 3 p. (1 a.)
Act X of 1886 (Criminal Law Amendment)	In Urdu. 9 p. (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act VI of 1887 (Companies Amendment)	In Urdu. 3 p. (1 a.)
Act VII of 1887 (Suits' Valuation)	In Urdu. 9 p. (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu. 2 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships)	In Urdu. 1 a. 6 p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu. 3 a. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a.)
Act XV of 1887 (Burma Military Police), ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVIII of 1887 (Allahabad University)	In Urdu. 1 a. (1 a.)
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu 6 p. (1 a.)
Ditto (as passed)	In Nagri. 6 p. (1 a.)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu. 3 p. (1 a.)
Ditto (as passed)	In Nagri. 3 p. (1 a.)
Act V of 1888 (Inventions and Designs)	In Urdu. 2 a. 3 p. (1 a.)
Act VI of 1888 (Debtors)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu. 1 a. 9 p. (1 a.)
Ditto	In Nagri 1 a. 9 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	In Urdu. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 6 p. (1 a.)
Act II of 1889 (Measures of Length)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. (1 a.)
Act VI of 1889 (Probate and Administration)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu. 5 a. (2 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri. 3 a. (1 a. p.)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894 ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVI of 1889 (Central Provinces Land Revenue) ...	In Urdu. 1 a. 6 p. (1 a.)
Ditto	In Nagri. 1 a. 0 p. (1 a.)
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu. 3 p. (1 a.)
Act I of 1890 (Revenue Recovery)	In Urdu. 3 p. (1 a.)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu. 3 p. (1 a.)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu. 6 p. (1 a.)
Act VI of 1890 (Charitable Endowments)	In Urdu. 6 p. (1 a.)
Act VIII of 1890 (Guardians and Wards)	In Urdu. 2 a. 3 p. (1 a. [illegible]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu. 5 a. (2 a.)
Act IX of 1890 (Railways), as modified up to 1st May, 1903	In Nagri. [illegible]

Act	Language	Price
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu.	3 p. (1 a)
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu.	3 p. (1 a)
Act XVIII of 1890 (Emigration Amendment)	In Urdu.	3 p. (1 a.)
Act XIX of 1890 (Salt Amendment)	In Urdu.	3 p. (1 a)
Act XX of 1890 (North-Western Province and Oudh)	In Urdu.	1 a. (1 a)
Act V of 1891 (Ports Act Amendment)	In Urdu.	3 p. (1 a)
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu.	3 p. (1 a)
Act XIV of 1891 (Oudh Courts)	In Urdu.	6 p (1 a)
Act XVIII of 1891 (Bankers Books Evidence), as modified by Acts I of 1893 and XII of 1900	In Urdu.	3 p. (1 a.)
Ditto ditto ...	In Nagri	6 p. (1 a)
Act II of 1892 (Christian Marriage Validation)	In Urdu.	3 p. (1 a)
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu.	6 p. (1. a)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ...	In Urdu.	3 p. (1 a)
Act IV of 1893 (Partition)	In Urdu.	3 p. (1 a)
Act I of 1894 (Land Acquisition)	In Urdu	2 a. 3 p (1a 6p)
Ditto	In Nagri	1 a. 6 p. (1a. 6p)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment) ...	In Urdu.	3 p. (1 a)
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu	3 p. (1 a)
Ditto	In Nagri	3 p (1 a)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ...	In Urdu.	4 a (1 a)
Ditto ditto	In Nagri.	3 a 9 p. (2 a)
Act IX of 1894 (Prisons)	In Urdu.	1 a. 3 p. (1 a.)
Ditto	In Nagri	2 a. 3 p. (1 a)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu	3 p (1 a)
Ditto ditto ...	In Nagri.	3 p (1 a)
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu.	3 a. (1 a)
Act XIV of 1895 (Pilgrim Ships)	In Urdu	1 a 3 p. (1 a)
Act II of 1896 (Cotton-duties)	In Urdu.	1 a. 3 p (1 a)
Ditto	In Nagri	1 a (1 a)
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu.	3 p. (1 a)
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act XII of 1896 (Excise), as modified up to 1st August 1903	In Nagri.	3 a. 3 p. (1 a)
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu	3 p. (1 a)
Act III of 1897 (Epidemic Diseases)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act IV of 1897 (Fisheries)	In Urdu.	3 p (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu.	3 p (1 a)
Ditto ditto	In Nagri.	3 p (1 a)
Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu.	3 p. (1 a)
Ditto ditto	In Nagri.	9 p. (1 a)
Act VIII of 1897 (Reformatory Schools)	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	9 p (1 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ..	In Urdu.	9 p. (1 a)
Ditto ditto ...	In Nagri.	9 p (1 a)
Act X of 1897 (General Clauses)	In Urdu.	1 a. (1 a.)
Ditto	In Nagri.	1 a. (1 a.)
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu.	3 p. (1 a)
Ditto ditto	In Nagri.	3 p. (1 a.)
Act XV of 1897 (Cantonments)	In Urdu	3 p (1 a.)
Act I of 1898 [Stage-carriages Act (1861) Amendment]	In Urdu.	3 p. (1 a)

Act	Price
Act I of 1898 [Stage Carriages Act (1861) Amendment]	In Nagri. 2 p. (1 a.)
Act III of 1898 (Lepers)	In Urdu. 0 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu. 3 p. (1 a.)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1900	In Urdu. Rs. 1-4. (8 a.)
Ditto ditto ...	In Hindi. Rs. 1-6. (8 a.)
Act VI of 1898 (Post Office)	In Urdu. 2 a. (1 a.)
Ditto	In Nagri. 2 a. (1 a.)
Act IX of 1898 (Live-stock Importation)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act X of 1898 (Indian Insolvency Rules)	In Urdu. 3 p. (1 a.)
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu. 6 p. (1 a.)
Ditto ditto	In Nagri. 6 p. (1 a.)
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu. 7 a. 6 p. (1a. 6p.)
Ditto ditto	In Nagri 7 a 6 p (1a. 6p.)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ...	In Urdu. 2 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. 3 p. (1 a.)
Act IV of 1899 (Government Buildings)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment] ...	In Urdu. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 p. (1 a.)
Act VIII of 1899 (Petroleum)	In Urdu. 9 p. (1 a.)
Ditto	In Nagri. 9 p. (1 a.)
Act IX of 1899 (Arbitration)	In Urdu. 9 p. (1 a.)
Ditto	In Nagri. 9 p. (1 a.)
Act XI of 1899 (Court-fees Amendment)	In Urdu. 9 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act XII of 1899 (Currency Notes Forgery)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act XIV of 1899 (Tariff Amendment)	In Urdu. 8 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act XVII of 1899 (Indian Registration Amendment	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act XVIII of 1898 (Land Improvement Loans Amendment)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act XX of 1899 (Presidency Banks)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto	In Nagri. 1 a. 3 p. (1 a.)
Act I of 1900 (Indian Articles of War Amendment)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act IV of 1900 [Indian Companies (Branch Registers)]	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act IX of 1900 (Amendment) of Court-fees Act, 1870)	In Urdu. 3 p. (1 a.)
Ditto ditto	In Nagri. 3 p. (1 a.)
Act X of 1900 (Census)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri. 3 p. (1 a.)
Act II of 1901 [Indian Tolls (Army)]	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 3 p. [illegible]
Act III of 1901 (Indian Posts)	In Urdu. 3 p. [illegible]
Act V of 1901 [Indian Forest (Amendment)]	In Urdu. 3 p. [illegible]
Ditto	In Nagri. [illegible]
Act VI of 1901 (Assam Labour and Emigration)	In Urdu. [illegible]

Addenda and Corrigenda List No. I of 1905 to the above ... ... 2 *a.* 6 *p.* (1 *a.*)

Index to Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895 ... ... 7 *a.* (2 *a.*)

Ditto ditto ... In Urdu and Nagri. 7 *a.* (2 *a.*)

Contents to ditto ditto ... In Urdu and Nagri. 1 *a.* 9 *p.* (1 *a.*)

The Baluchistan Agency Forest Law, 1890 ... In Urdu .. 2 *a.* (1 *a.* 6 *p.*)

The Quetta Municipal Law, 1896 ... ... In Urdu ... 3 *a.* 3 *p.* (1 *a.* 6 *p.*)

The Baluchistan Agency Criminal Justice Law, 1896 In Urdu ... 9 *p.* (1 *a.*)

The Baluchistan Agency Civil Justice Law, 1896 ... In Urdu ... 2 *a.* 6 *p.* (1 *a.*)

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Addenda and Corrigenda List No. 1 of 1895 to the above ... ... 2 a. 6 p. (1 a.)

Index to Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895 ... ... 7 a. (2 a.)

Ditto ditto ... In Urdu and Nagri. 7 a. (2 a.)

Contents to ditto ditto ... In Urdu and Nagri. 1 a. 9 p. (1 a.)

The Baluchistan Agency Forest Law, [illegible] ... In Urdu ... 2 a. (1 a. 6 p.)

The Quetta Municipal Law, [illegible] ... ... In Urdu ... 3 a. 3 p. (1 a. 6 p.)

[illegible] Criminal Justice [illegible]

TABLE OF CASES REPORTED.

PAGE.

PRIVY COUNCIL.

FULL BENCH.

APPELLATE CIVIL.

TABLE OF CASES CITED.

INDEX.

PAGE.

1909

ABDUL LATIF KHAN v. NIAZ AHMAD KHAN.

some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs," and contends that this is inconsistent with the opinon expressed on page 326 as quoted above. We do not think this is so. What is referred to on page 405 is the case of a valid marriage, where there has been no fraud or coercion. As we have pointed out above, if a marriage was procured by fraud it is invalid. In this case according to the finding of the court below the marriage of the defendant with the deceased Musammat Akbari was the result of a fraud perpetrated upon him, and therefore it was an invalid marriage. It necessarily follows that the defendant was not liable to pay the dower of the deceased and the plaintiff's suit has been rightly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

1909
March 4.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

THAN CHAND (DECREE-HOLDER) v. JAGANNATH (JUDGMENT-DEBTOR.)*

Code of Civil Procedure (Act XIV of 1882), section 310A—Act No. IV of 1882 (Transfer of Property Act), section 89—Sale held in pursuance of a decree under section 89 of the Transfer of Property Act.

The appellant obtained an order absolute under section 89 of the Transfer of Property Act, caused the property to be sold and purchased it himself. The judg- [illegible] 310 A of the Code of Civil Pro- [illegible]

[illegible] the provisions of the [illegible]

tion by the judgment-debtor could be entertained under section 310A.

THE facts of this case are as follows:—

The appellant, Lala Than Chand, got a decree for sale under a mortgage in a suit to which the respondent, Jagannath, was a party as puisne mortgagee. The decretal amount was not paid within the time fixed by the Court under section 88 of the Transfer of Property Act, 1882. The mortgagee decree-holder obtained an order absolute under section 89 of Act IV of 1882, and brought the mortgaged property to sale and purchased it himself. Jagannath deposited the purchase money and applied

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* Second Appeal No. 673 of 1908 from a decree of Ahmad Ali Khan, officiating Additional District Judge of Aligarh, dated the 29th of April 1908, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 15th of July 1907.

1909

THAN CHAND v. JAGANNATH.

to have the sale set aside under section 310A of the Code of Civil Procedure, 1882. The lower Courts allowed the application. The decree-holder purchaser appealed to the High Court.

Babu *Surendra Nath Sen*, for the respondent, raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay. He cited *Bashir-ud-din* v. *Jhori Singh* (1), *Imtiazi Begam* v. *Dhuman Begam* (2). He further submitted that section 310A of the Civil Procedure Code did apply to a sale held in virtue of an order absolute under section 89 of the Transfer of Property Act. He relied on *Raja Ram Singhji* v. *Chunni Lal* (3), *Mallikarjunadu Setti* v. *Lingamurti Pantulu* (4), *Krishnaji* v. *Mahadev Vinayak* (5).

Maulvi *Shafi-uz-zaman*, for the appellant, contended that section 310A of the Code of Civil Procedure did not apply to a sale carried out in pursuance of section 89 of the Transfer of Property Act, 1882 He relied on *Kedar Nath Raut* v. *Kali Charan Ram* (6). When an order absolute was passed under section 89, the puisne mortgagee lost his right to redeem the property and he was thereby precluded from availing himself of the equitable provisions of section 310A.

KNOX and GRIFFIN, JJ.—A preliminary objection is raised to the hearing of this appeal, but we do not think it necessary to decide it, as independently of the objection we are of opinion that the appeal must fail.

The appeal before us is a second appeal and the contention raised by the decree-holder is to the effect that section 310A of the Code of Civil Procedure is not applicable to a sale carried out under the provisions of section 89 of the Transfer of Property Act. The sale in the present instance was carried out in pursuance of an order absolute passed under section 89 of the Transfer of Property Act. This High Court has not thought necessary to avail itself of the power given by section 104 of the Act to lay down any rules for carrying out orders under Chapter IV of Act No. IV of 1882. The suit out of which this appeal arose was a suit of the nature provided for in Chapter IV. In the absence of any special rule, the provisions contained in the Code

(1) (1896) I. L. R., 19 All., 140.
(2) (1907) I. L. R., 29 All., 275.
(3) (1897) I. L. R., 19 All., 205.
(4) (1902) I. L. R., 25 Mad., 244.
(5) (1900) I. L. R., 25 Bom., 104.
(6) (1898) I. L. R., 25 Calc., 703.

1909

TIKAM CHAND v. JAGANNATH.

of Civil Procedure for suits and execution proceedings in suits govern suits brought under the provisions of Chapter IV of the Transfer of Property Act. We are, therefore, prepared to hold that the sale which was carried out under Chapter XIX of the Code of Civil Procedure, was a sale to which the provision of section 310A are expressly made applicable and the decision of the lower appellate court is not open to question on this account. We were referred to several cases of the Calcutta and Bombay High Courts. Both of those courts have made special rules and the case decided by those courts differ, therefore, from the present case. Over and above this we should not be inclined to interfere unless it was absolutely necessary, seeing that the decree-holder has got his money and all that he is entitled to, in the interests of justice. He has endeavoured to take advantage of technical procedure in order to retain the mortgaged property, instead of being satisfied with the money due under the mortgage-bond. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1909 *March* 22.

Before Mr Justice Sir George Knox, Mr. Justice Aikman and Mr. Justice Griffin.

NAJIB-ULLAH (DEFENDANT) *v.* GULSHER KHAN AND ANOTHER (PLAINTIFFS.)*

Act (Local) No II of 1901, *(Ag*[illegible] *Act), section* 32—*Division of* [illegible] *occupancy holding—Suit for d*[illegible]

A suit for a declaration of right [illegible] maintainable and is not forbidden by [illegible] Act, 1901, *Ashiq Husain* v. *Asghari Begam* (1) followed. *Achhey La*[illegible] *Prasad* (2) overruled.

THE facts of this case are as follows:—

One Imam Bux, the father of the parties, was possessed of an occupancy holding of considerable extent. He died before the present Tenancy Act came into operation. He left him surviving a widow and four sons. Under the Muhammadan law the plaintiffs were entitled to 14 *sihams* out of 32 *sihams*, and

* Appeal No. 48 of 1908 under section 10 of the Letters Patent.

(1) (1907) I. L. R., 30 All., 90. (2) (1903) I. L. R., 25 All., 65.

and they brought the present suit for a declaration of their right to that share. The Court of first instance decreed the plaintiffs' claim. The lower appellate court held that having regard to the provisions of section 32 of the Tenancy Act 1901, the suit could not be brought and accordingly dismissed it. The plaintiff appealed to the High Court. RICHARDS, J., set aside the decree of the lower appellate Court and remanded the suit.

The defendants appealed under section 10 of the Letters Patent. The appeal was referred to a Full Bench by STANLEY, C. J., and BANERJI, J.

Dr. *Tej Bahadur Sapru*, for the appellants:—The court was not competent to grant a declaration of the plaintiffs' right to the occupancy holding as that would directly defeat the provisions of section 32 of the Tenancy Act. In the Rent Act of 1881, there was no provision corresponding to section 32 of the present Act; this section was taken from the Bengal Tenancy Act (VIII of 1885) with a view to protect the landlord against any division of the tenancy. The landlord is entitled to look upon the holding as a single undivided one so that his right to collect rent may not be injuriously affected. Joint tenants cannot during the jointness of their tenure say that each of them has so much share in it and no more, and pay rent to the landlord accordingly. *Achhey Lal* v. *Janki Prasad* (1).

The effect of a declaration would be a division of the holding. Section 32, clause 2, says: "No suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained." If a share of one of several joint tenants be declared, it may affect the distribution of rent within the meaning of that section. There is no uniformity in the rulings upon this point. *Ashiq Husain* v. *Asghari Begam* (2) is against the appellant, but in this case the earlier ruling was not cited. *Ayub Ali Khan* v. *Mashuq Ali* (3), and *Ajudhia Singh* v. *Ram Dayal Upadhia* (4) were referred to. Division in section 32 may mean either actual physical division or definement of interest. The legislature meant that the integrity of a

(1) I. L. R., 29 All., 66.
(2) I. L. R., 30 All., 90.
(3) Weekly Notes, 1903, p. 231.
(4) Weekly Notes, 1903, p. 3.

1909

NAJIB-UL-LAH v. GULSHER KHAN.

holding should be strictly preserved and no attempt should be allowed to be made to break it either physically or otherwise. Maxwell on the Interpretation of Statutes, 4th Edition, p. 176. Moreover, such a declaration is practically useless. Section 42 of the Specific Relief Act is a discretionary section and the aid of this section should not be invoked for an infructuous object.

Mr. *Abdul Raoof*, for the respondents:—The object of section 32 is that so far as the relation of landlord and tenant is concerned it must remain *intact*. The first clause of the section says that no division of a holding or distribution of the rent in respect thereof shall be binding on the landlord. It does not prevent the division of the holding in any event. Clause 2 of the section should not be read as laying down a different rule. *Achhey Lal* v. *Janki Prasad* (1) does not apply to a case where the parties are Muhammadans. Referring to section 22, he submitted that where the tenancy devolves upon many persons and any one of them gets possession thereof to the exclusion of others, the excluded persons will be without any remedy. A declaration of title cannot militate against the objects of section 32. *Ashiq Husain* v. *Asghari Begam* (2).

Dr. *Tej Bahadur Sapru* replied.

The following judgments were delivered:—

AIKMAN, J.—This appeal has been referred to a Bench of three Judges on account of conflicting decisions of this Court upon the main question which arises in the appeal. That question, shortly stated, is whether a co-sharer in an agricultural holding is barred by the provisions of section 32 of the Tenancy Act from maintaining a suit for declaration of his rights in the holding. In the case *Achhey Lal* v. *Janki Prasad* (1), it was held that a suit of this nature could not be maintained having regard to the provisions of the section quoted. In the cases *Ashiq Husain* v. [illegible] *Mashuq Ali Khan* (3 [illegible] it the section d[illegible] a declaration of his right to a share in a holding. In the last two cases it does not appear that the decision in *Achhey Lal* v. *Janki Prasad* was cited and no reference is made to it in either of

(1) (1906) I. L. R., 29 All., 66. (2) (1907) I. L. R., 30 All., 90.
(3) Weekly Notes, 1906, p. 291.

these cases. Section 32 (1) does not forbid the co-sharers in a holding dividing the holding or making a distribution of the rent amongst themselves. It merely declares that such division or distribution shall not be binding on the land-holder unless it is made with his consent. Sub-section (2) enacts that no suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any Civil or Revenue Court. In the case, *Achhey Lal* v. *Janki Prasad*, it was observed that a Civil or Revenue court should not entertain a suit or other proceeding which has the effect of causing the division of a holding. With this observation I entirely agree, and if I were of opinion that a declaratory decree as to his rights obtained by one co-sharer in a holding against the other co-sharers would necessarily result in a division of the holding or a distribution of the rent, I should have no hesitation in accepting the view expressed in the case last mentioned. But it appears to me that a declaration as to his rights obtained by one co-sharer against the other co-sharers does not and cannot effect any division of the holding or distribution of the rent thereof. Notwithstanding such a declaration the holding would remain as before a single holding and the co-sharers would continue jointly responsible to the land-holder for the rent. No doubt, if having got his declaration the plaintiff attempted on the strength of it to sue for an actual division of the land or a distribution of the rent, his suit would be barred by the provisions of section 32 (2). To hold that a co-sharer in a holding, who is deprived by the other co-sharers of the whole or a portion of his interest therein cannot maintain a suit for a declaration of his rights would amount to a denial of justice, as, so far as I can see, he would have no other remedy. Section 22 provides that when an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant dies, his interest in the holding shall devolve on his male lineal descendants in the main line of descent. Under this section if a tenant dies leaving two sons, his sons become co-sharers in the holding. If one son usurps the whole holding to the exclusion of his brother, the law could never have intended that in such a case the latter should be left entirely without a remedy. The court of first appeal held that the present suit, which was brought by the

1909

NAJID-UL-LAH v. GULSHER KHAN.

plaintiffs respondents, not for an actual division of the holding, but for a declaration against their co-sharers as to the extent of their interest therein, was not maintainable having regard to the provisions of section 32 and the ruling in *Achhey Lal* v. *Janki Prasad*. Our learned colleague whose judgment is under appeal sustained the plea that the court of first appeal was wrong in so holding and remanded the case for trial on the merits under section 562 of the former Code of Civil Procedure. In the appeal before us the ground taken is that "the suit being one virtually for division of an occupancy holding is barred by section 32 of the Agra Tenancy Act." In my opinion the suit is in no sense, virtually or otherwise, a suit to divide a holding. I concur in the judgment of our learned colleague except in one respect only, namely, his attempt to distinguish the case relied on by the court of first appeal. For these reasons I would dismiss the appeal with costs.

GRIFFIN, J.—I have nothing to add to the judgment of my learned brother AIKMAN and I concur in the order proposed by him.

KNOX, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

1909
March 24.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

JAMNA DAS, (DECREE-HOLDER) v. RAMAUTAR PANDE AND OTHERS (JUDGMENT-DEBTORS.)*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 90—*Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage money part of sale consideration—Personal liability of purchaser—Sale of mortgagee rights.*

A mortgaged certain property to *B* and sub-mortgaged certain other property by the same deed. He subsequently sold the whole of this property to *C* and left with him the bulk of the sale consideration for redemption of the mortgage and sub-mortgage. *B* obtained a decree for sale of the mortgaged property, but not of the sub-mortgaged property. The proceeds of the sale of the mortgaged property proving insufficient, the decree-holder applied for

* First Appeal No. 158 of 1907, from a decree of Shah Amjad-ullah, Subordinate Judge of Mirzapur, dated the 16th April 1907.

a decree under section 90 of the Transfer of Property Act against *C* and the personal representative of *A*.

Held that by retaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to *B*, *C* did not become personally liable, and a decree under section 90, Transfer of Property Act, could not be made against him.

THE facts of this case are as follows:—

Musammat Lakhpati Kuar mortgaged certain properties to the appellant Jamna Das for Rs 40,000. The property motgaged consisted of zamindari property and mortgagee rights in certain zamindari property. On November 24, 1896, Lakhpati Kuar sold the *entire* mortgaged property for Rs. 44,000 to Pandit Ramautar Pande, respondent. Out of this consideration only Rs. 4,000 were paid to the vendor, Lakhpati Kuar, and Rs. 40,000 were left with the vendee, Pandit Ramautar Pande, to pay off the mortgage, but this he never paid to the mortgagee. On February 9th, 1900, the mortgagee brought a suit for sale on his mortgage against both the mortgagor and the vendee, and eventually the High Court, on November 29, 1904, decreed the suit for sale of the zamindari property only. As regards the mortgagee rights the High Court said: "If the rest of the mortgaged property does not prove of sufficient value to satisfy the plaintiff's mortgage in full, it will be open to him to apply in execution for a sale of the mortgagee rights in question. This Court cannot, however, make at present any order for the sale of this portion of the mortgaged property" On November 26, 1905, an order absolute was passed and the zamindari property was sold thereafter. The decree-holder realized the sale proceeds, and a balance of Rs. 25,547-7-0 remained due to him. On January 7, 1907, the decree-holder applied for a decree under section 90, Transfer of Property Act, against both the mortgagor and Pandit Ramautar Pande. The Subordinate Judge disallowed the application as against Pandit Ramautar Pande, holding, on the authority of *Ram Lal* v. *Sil Chand* (1), that a decree under section 90 could be passed only against the mortgagor-defendant. The decree-holder appealed to the High Court.

Dr. *Satish Chandra Banerji* (Babu *Jogendra Nath Chaudri* and Pandit *Moti Lal Nehru* with him), for the appellant,

(1) (1901) I. L. R., 23 All., 459.

1909

JAMNA DAS v. RAMAUTAR PANDE.

contended that the case relied on by the lower court was a very different case. There costs were sought to be recovered from a subsequent incumbrancer and the learned Judges limited their decision to the facts of that case. The purchaser merely of the equity of redemption stands on a different footing from the purchaser of the property who takes over the mortgage debt and undertakes to pay it off. Here there was an assumption of the mortgage by Ramautar Pande and he was therefore personally liable to pay the mortgage-money which he had retained *in his* hands. Section 55, sub-section (5), clause (6) of *the Transfer* of Property Act was referred to.

He further contended that the mortgagee rights which had not been sold were undoubtedly mortgaged property over which the mortgagee had still a subsisting charge or *lien*, and the property being in the hands of the vendee, *the* balance due to the mortgagee was legally recoverable *from* this particular defendant otherwise than out of the property which had been sold. Section 90 did not expressly or impliedly limit the word 'defendant' to the mortgagor. The mortgagee *in his suit had* asked for a personal decree against *all the defendants. That* relief could not be granted to *him at that stage. But* the High Court then said that if the sale did not *satisfy* the decree, the mortgagee rights could be proceeded against in execution. That was what the decree-holder was now seeking to do and the equities were entirely in his favour. He cited *In the matter of Act I of* 1879, (1), *Ram Shankar* v. *Ganesh* (2), 1 Jones, *Law of Mortgage*, sections 740, 741, 748, 3 Pomeroy, *Equity Jurisprudence*, sections 1205—6, pp. 2401—6.

Hon'ble Pandit *Sundar Lal*, for the respondent, contended that Ramautar Pande, the transferee, was not personally *liable*. There was absolutely no covenant between Ramautar Pande and the mortgagee. Under section 90 of the Transfer *of* Property Act, it was the personal liability of the mortgagor which was enforced, as in every mortgage there was a covenant by the mortgagor to personally pay the money. By seeking to obtain a personal decree under section 90 against Ramautar Pande, the decree-holder was trying to enforce the obligation *of* Ramautar Pande

(1) (1883) I. L. R., 10 Calc., 92, 95. (2) (1907) I. L. R., 29 All., 385.

to his own vendor, i. e, the mortgagor. This he obviously could not do, as he, being a third party and not privy to the contract could not enforce it (Indian Contract Act, section 37). Ramautar Pande was certainly liable to his vendor and there might be equities as between him and his vendor which could not be considered now. His vendor, for instance, might not have a clear title and Ramautar Pande might be entitled to keep the purchase money in reserve with him. This was not a suit to enforce the contract between the mortgagor and Ramautar Pande but an attempt to enforce the personal liability of the mortgagor under the mortgage. No Indian or English case could be cited in support of the American doctrine of assumption of liability relied upon by the decree-holder. The decision of the High Court refusing a decree for sale of the mortgagee rights was wrong, but the decree-holder should have appealed against it, and cannot now obtain a decree under section 90 for its sale.

Pandit *Moti Lal Nehru*, in reply, submitted that the decree of the High Court had become final as between the parties, and for the purposes of the present proceedings must be treated as the right decision in the case. The High Court had never held that the mortgagee rights could not be mortgaged: all that the High Court held was that there could be no decree for their sale under section 88. In this particular case the High Court had further held that in the event of the sale proceeds proving insufficient, the decree-holder might take out execution against the mortgagee rights. Even if no personal decree could be passed against Ramautar Pande, there could certainly be a money decree so restricted as to be executable against the mortgagee rights alone. That was property other than the property sold which had been expressly mortgaged for the payment of this debt, and to realise the balance now due it could be sold in the hands of a transferee from the mortgagor. The Indian Contract Act did not provide that none but a party to a contract could sue to enforce any benefit to which he might be entitled under it. Admittedly the mortgagor was under a personal liability to the mortgagee, and the vendee was under a personal liability to the mortgagor. All the parties being before the Court now, this

Court as a Court of equity should adjust the rights of all the parties once for all.

Munshi *Girdhari Lal Agarwala* was heard in support of an objection on behalf of the personal representative of Lakhpati Kuar, mortgagor, judgment-debtor.

RICHARDS and GRIFFIN, JJ.—This appeal arises out of a suit to enforce a mortgage and an application by the decree-holder for a decree under section 90 of the Transfer of Property Act. On the 6th of June, 1893, a mortgage was executed by Musammat Lakhpati Kuar in favour of Jamna Das. The money was recoverable in 10 years. The mortgage deed contains sundry provisions providing for earlier realisation of the money secured in certain events. The property mortgaged was partly zamindari property and partly mortgagee rights in zamindari property. The principal amount was the sum of Rs. 40,000. On the 24th of November 1896, the mortgagor sold the entire mortgaged property to the defendant, Pandit Ramautar Pande, for the sum of Rs. 44,000 out of which Rs. 4,000 only passed and the balance was left in the hands of Pandit Ramautar Pande for payment of the mortgage-money due to Jamna Das. On the 9th of February 1900, Jamna Das sued for sale of the mortgaged property and for a personal decree in the event of the mortgaged property proving insufficient. Musammat Lakhpati Kuar and Pandit Ramautar Pande were both made defendants. Several defences were raised including the defence that the suit was premature. The case went to the High Court and the Court held that under the terms of clause 12 of the mortgage deed the plaintiff's cause of action arose on the 24th of November 1896. We particularly mention this matter as it has an important bearing on the objections filed on behalf of Badri Prasad, the representative of Musammat Lakhpati Kuar. The result of the suit was a decree against all the defendants for the sale of the zamindari property. The mortgagee rights were not included in the decree for sale. The Court felt itself bound by the decision in *Mata Din Kasodhan* v. *Kazim Husain*(1). For this reason it reluctantly excluded from the decree for sale so much of the mortgaged property as was represented by the

(1) (1891) I.L.R., 13 All., 432.

mortgagee rights. In execution of the decree the zamindari property was put up for sale and realised the sum of Rs. 24,547-7. This left, of course, a substantial balance due to the mortgagee, and he accordingly applied for a personal decree against Pandit Ramautar Pande and the representative of Musammat Lakhpati Kuar. In the application the decree-holder says after reciting the facts: "As now remains no property which might be saleable under the High Court decree, dated 29th November 1904, according to the provisions of the Transfer of Property Act, the applicant prays that a decree under section 90 of the Transfer of Property Act may be passed in his favour so that by executing that decree the applicant may recover, with costs and future interest, the amount due to him from the mortgagee right of Musammat Lakhpati Kuar and the property left by her and also from the person and other property of Pandit Ramautar Pande, who, notwithstanding his knowledge of the mortgage made to the applicant, and his express contract as to the payment of the amount of the mortgage due to the applicant, got the mortgaged zamindari property transferred to himself and for several years enjoyed the considerable profits accruing from the mortgaged zamindari property, without paying the amount due to the applicant." In spite of its prolixity of form this is simply an application under section 90 of the Transfer of Property Act, which provides that "when the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant, otherwise than out of the property sold, the court may pass a decree for such sum." The Court has held that the balance is not "legally recoverable from the defendant, Pandit Ramautar Pande, otherwise than out of the property sold." A decree has been made against the representative of Musammat Lakhpati Kuar. The decree-holder has appealed against so much of the order of the court below as refuses a personal decree against Pandit Ramautar Pande, and objections have been filed on behalf of the representative of Musammat Lakhpati Kuar. It no doubt appears inequitable that Pandit Ramautar Pande should have taken a transfer of the mortgaged property for Rs. 44,000 on condition of paying Rs. 40,000 in satisfaction of

1909

JAMNA DAS v. RAMAUTAR PANDE.

the mortgage, and that he should now be permitted to retain a large part of the mortgaged property without discharging his obligation. This is however the unfortunate result of the decision we have referred to. Happily the ruling in *Mata Din Kasodhan* v. *Kazim Husain* is no longer acted upon by this Court, see the Full Bench ruling in *Ram Shankar Lal* v. *Ganesh Prasad* (1). The simple question is, can it be said that the balance of the mortgage debt is legally recoverable from Pandit Ramautar Pande otherwise than out of the property sold? The mortgagee rights unfortunately cannot be sold because the decree of the High Court, dated 29th November 1904, was unappealed from and has become final. If the decree-holder is not entitled to a personal decree against Pandit Ramautar Pande, he is without a further remedy in the present suit. It is contended that by retaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to Jamna Das, he became personally liable. In our opinion this contention is not sound. Jamna Das was no party to the contract between Musammat Lakhpati Kuar and Pandit Ramautar Pande. No Indian or English case has been cited to us in which it has been ever held or suggested that the transferee of the equity of redemption in mortgaged property becomes personally liable to the mortgagee. Sections 1205 and 1206 of Pomeroy's "Equity Jurisprudence as administered in the United States of America" have been cited to us. We think it unnecessary to discuss the opinion of the learned author. No English authority is cited for any of the propositions laid down

...ie objections filed on behalf of the representative of ...mmat Lakhpati Kuar are to the effect that the application ...rsonal decree is time-barred. We have already mentioned ...he High Court in this very suit held that the cause of ... arose to the plaintiff on 24th November 1896. Thi... ...n on the construction of the mortgage deed is bindin...

The suit in which the decision was given was a sui... the provisions of the Transfer of Property Act, and w... ako it that the suit was not only for the sale of the...

(1) (1907) I. L. R., 29 All., 385.

1909

JAMNA DAS v. RAMAUTAR PANDE.

mortgaged property but also, in certain events, for decree under section 90. The plaint itself contained a prayer for such relief. We think we cannot go behind the decision of the High Court. We accordingly disallow the objections filed on behalf of the representative of Musammat Lakhpati Kuar with costs. There only remains the question of the costs of the respondent Pandit Ramautar Pande. In the court below the costs of this respondent were thrown on the decree-holder We think that Pandit Ramautar Pande should bear his own costs in the court below and in this Court. We do not desire to express any strong opinion on the conduct of Ramautar Pande in not keeping his bargain with his vendor, particularly as it is suggested by the learned advocate that he may have some equity against his vendor. The fact, however, remains that he became transferee of the equity of redemption in the mortgaged property stipulating that he would pay the amount of the mortgage to Jamna Das. He did not do so, and in the events which have happened he is holding a substantial portion of the mortgaged property without even discharging the debts due thereon. We dismiss the appeal and direct that the appellant and Pandit Ramautar Pande do bear their own costs in this Court and in the court below. The other respondent on whose behalf the objections were filed must pay the decree-holder's costs.

Appeal dismissed.

1909
March 26

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

NAND RAM (DEFENDANT) v. MANGAL SEN AND ANOTHER (PLAINTIFFS).*

Hindu Law—Partition—Property gifted away to one son to the detriment of another—Share in the property gifted.

When a Hindu father governed by the *Mitakshara* makes a gift of his moveable property to one son to the detriment of the other, not on account of affection for that son, but to punish and disinherit the other son, *held* that the alienation is bad and that in a suit for partition the son can claim a share in the property gifted to the other son.

THIS was a suit for partition of joint family property, which included both moveable and immoveable property. One of the defences set up was that the movable property had been given

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*Second Appeal No. 154 of 1908, from a decree of H. J. Bell, District Judge of Aligarh, dated the 26th of November 1907, modifying a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 2nd of April 1907.

away by the father of the plaintiff, Mangal Sen, to Nand Ram, a younger brother of Mangal Sen and that the father having full power of disposition over moveables, the gift could not be questioned by the plaintiffs and the moveables given away could not be included in the partition. Both the courts below decreed the plaintiffs' suit in respect of the moveable as well as of the immoveable property. The finding of the lower appellate court in regard to the gift of the moveables was that the gift was "not so much out of affection to one son as based on the motive of dealing retribution to another son." The defendant Nand Ram appealed to the High Court.

Munshi *Gulzari Lal* (with him Babu *Durgacharan Banerjee*) for the appellant, submitted that the father had the power to give away his moveable property to any one of his sons and the other son could not question the alienation. He cited Mayne, *Hindu Law*, pages 435 and 436. *Mitakshara*, Ch. I, section I, paras. 27 and 28. *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (1). *Rayadur Nallatambi Chetti* v. *Rayadur Mukunda Chetti* (2).

Dr. *Satis Chandra Banerji*, for the respondents, cited *Yagnavalkya* Ch. II, verse 121. भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा। तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः

["Inasmuch as the ownership of father and son is co-equal in the acquisitions of the grandfather, whether they be land, any settled income, or moveables, in them the ownership of the father and son is equal."]

He submitted that the original text made no distinction between moveable and immoveable property in respect of the father's power of alienation. The *Mitakshara* did make a distinction but it was open to question if the passage in the *Mitakshara* laid down a mandatory rule of law or was only advisory. The earlier cases on the point, no doubt, were in favour of the appellant but the later cases made no distinction between moveable and immoveable property. Besides, even if the text in the *Mitakshara* might be taken to be mandatory in its nature, the present case did not come within the exceptions to the general rule formulated by *Vijnaneswara*, in which cases alone the father could alieante moveable property. The

(1) (1876) I. L. R., 1 Bom., 561. (2) (1869) 3 Mad., H. C. Rep., 455.

We need only refer to a few of the leading authorities on the subject. In the case of *Raja Ram Tewary* v. *Luchmun Pershad* (1), this question was considered and it was decided that according to the *Mitakshara* law a son acquires by birth a right in ancestral property and has a right during his father's lifetime to compel the partition of such property; that the father cannot without the consent of his son alienate such property, except for sufficient cause, and that the son may not only prohibit the father from so doing but may sue to set aside the alienation if made. In delivering the judgment of the Court in that case Sir BARNES PEACOCK, C.J., at p. 20 observes: "It is clear then that the son by birth alone acquires a right in ancestral property and that he has a right during his father's lifetime to compel a partition of such property; that the father cannot without the consent of the son alienate such property except for sufficient cause; and that the son may prohibit the father from so doing. It has been held that the son has not merely the right to prohibit but that he may sue to set aside the alienation if made." No distinction, it will be observed, is here drawn between moveable and immoveable property.

The same question came before the Bombay High Court in the case of *Laksham Dada Naik* v. *Ram Chandra Naik* (2). There, after a review of the authorites, it was held that a Hindu governed by the *Mitakshara* law, who has two sons undivided from him cannot whether or not his act be regarded as a gift or a partition, bequeath the whole, or almost the whole of the ancestral moveable property to one son to the exclusion of the other. In delivering the judgment of the Court in that case, MELVILL, J., observes: "From the above authorities we come to the conclusion that it was not within the power of Dada Naik (*i.e.*, the father) (whether his act be regarded in the light of a gift or of a partition) to bequeath the whole, or almost the whole of the ancestral moveable property to one son and virtually to disinherit the other." This case came before their Lordships of the Privy Council on appeal, * and at the hearing it was conceded by the counsel for the parties that

(1) (1867) 8 W. R., 15. (2) (1876) I. L. R., 1 Bom., 561.

*See (1880) 7 I. A., 181: I. L. R., 5 Bom., 48, P. C.—ED.

according to the *Mitakshara* law a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons. The question was also considered in the case of *Jugmohan Das Mangal Das* v. *Sir Mangal Das Nathubhoy* (1), in an appeal from a decision of SCOTT, J., who held that whether the law of the *Mayukha* applies, or the *Mitakshara*, a son is entitled to demand partition of moveable as well as immoveable property in his father's lifetime. The learned Judges who heard the appeal upheld the decision of SCOTT, J, and held that there was no distinction between moveable and immoveable property as regards the right of a son in an undivided family governed by the *Mitakshara* law to partition in the lifetime of the father.

We think that in view of these authorities it is clear that unless a case be brought within the exceptions mentioned in the *Mitakshara* there is no distinction as regards the right to partition between moveable and immoveable property. We therefore must turn to the *Mitakshara* to see whether or not in this case the father was justified in making a gift of the moveable ancestral property to one son so as to exclude from participation therein the other son. We find from a reference to it that property, whether moveable or immoveable, in the paternal or ancestral estate is by birth, but that a father has independent power in the disposal of effects, other than immoveable, for indispensible acts of duty and for the purposes prescribed by texts of law (see chapter I, section I, paragraph 27). The purposes prescribed by texts of law are gift through affection, support of the family, relief from distress, and so forth. If the gift of the moveable property in this case had been made to the defendant Nand Ram through affection, different considerations would arise from those which we have to consider. It is clear from the finding of the lower appellate court that the gift of the moveable property was not made to Nand Ram out of affection but for the purpose of punishing the other son and from vindictive feelings. That is the finding of the lower appellate court which we must accept in second appeal. In view of this finding we cannot say that the gift was one which comes within the purposes mentioned

(1) (1886) I. L. R., 10 Bom., 528

1909

NAND RAM v. MANGAL SEN.

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(1) (1867) 8 W. R., 15. (2) (1876) I. L. R., 1 Bom., 561.
*See (1880) 7 I. A., 181; I. L. R., 5 Bom., 48, P. C.—ED.

that the suit was barred under the provisions of sections 583 and 244 of the Code of Civil Procedure, (Act XIV of 1882,) dismissed the suit. The plaintiffs appealed to the High Court.

Babu *Jogindra Nath Chaudhri* (with him Munshi *Gulzari Lal*), for the appellants, submitted that section 583 did not apply to the present case. It referred only to a decree passed in appeal. There being no decree passed in appeal in the present case, the section had no application. Section 244 also did not apply. The question involved in the suit was one of restitution and not of execution.

Babu *Durga Charan Banerjee* (with him Pandit *Mohan Lal Sandal*), for the respondents, submitted that section 244 applied to the case and that the plaintiffs had no remedy by a separate suit. The plaintiffs should have applied in execution for the recovery of the property. Not having done so their suit was barred. He relied on *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1).

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for possession of property which had passed into the hands of an auction-purchaser under a sale in execution of an *ex parte* decree which was subsequently set aside. The property in dispute belonged to one Toti Singh who left him surviving his widow, his sister-in-law, and a minor son named Chait Singh. These relatives were recorded as owners upon his death. In 1883 the widow and sister-in-law purporting to act for themselves, and also as guardian of the minor Chait Singh, mortgaged the share in question to the respondent Khushali Ram. A suit for sale was brought on this mortgage and on the 23rd of July 1895, an *ex parte* decree for sale was passed and in execution of this decree, the property was sold and purchased by Khusali Ram on the 20th of December 1897. Chait Singh then applied to have the *ex parte* decree set aside and on the 9th of December 1899, his application was granted and the *ex parte* decree was set aside. In the meantime however Khusali Ram had obtained possession of the property as auction-purchaser. On the 10th of August 1904, a second decree for sale was passed but before this sale was carried out a puisne incumbrancer paid off the amount of the decree obtained by Khushali Ram and thereby satisfied the

(1) (1892) I. L. R., 19 Calc., 953.

1909

ALI AHMAD KHAN v. BANSIDHAR.

Ali Ahmad objected saying *inter alia* that the property cannot be sold. His objections were dismissed by the court below and he now comes here in appeal. No argument was addressed to us on the first ground contained in the memorandum of appeal. The second ground, *viz.* that the attachment of 1898 no longer subsists does not commend itself to us. It has been held by the Calcutta High Court in an exactly similar case, *Bonomali Rai* v. *Prosunno Narain Chowdhry and Muzaffar Shah* (1), following *Mahomed Warris* v. *Pitambur Sen* (2), that the case in the Weekly Reporter was a clear authority for the view that "the lien of the attaching creditor dated from the attachment and was not destroyed or affected by the order of release which was in effect set aside by the decree. This point was again considered and these cases were followed in *Ram Chandra Marwari* v. *Mudeshwar Singh* (3). This view is also consistent with that taken by the Bombay High Court in *Lalu Mulji Thakar* v. *Kashi Bai* (4) and *The Bank of Upper India* v. *Sheo Prasad and others* (5). We would note at the same time that from the commencement and up to date there has been an unbroken continuity in the efforts made by the decree-holder to obtain satisfaction of his decree. The original purchaser Bholanath purchased the property at a time when it was subject to an attachment order of a Civil Court and Ali Ahmad can hold no higher position.

This disposes of the remaining pleas taken in appeal. The appeal is dismissed with costs.

Appeal dismissed.

1909
April 16.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

SHEOLAL SINGH (PLAINTIFF) *v.* SUKHDEO SINGH AND OTHERS (RESPONDENTS.)*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 7—Applicability of—to mortgage executed in 1894—Mortgage of sir—Whether mortgagor obtains exproprietary rights.

R in 1894 made a usufructuary mortgage of his *sir* land to the plaintiff. *S*, the son of R, on the following day executed a *kabuliat* promising to pay rent in respect of that land to the mortgagee. The lower appellate court held that *S*

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* Appeal No. 90 of 1908 under section 10 of the Letters Patent.

(1) (1896) I. L. R., 23 Calc., 829.
(2) (1874) 21 W. R., 435.
(3) (1906) I. L. R., 33 Calc., 1158.
(4) (1886) I. L. R., 10 Bom., 400.
(5) Weekly Notes, 1897, p. 124.

1909

SHEO LAL SINGH v. SUKHDEO SINGH.

was joint with his father at the time of the mortgage and became an exproprietary tenant and was not liable to pay a higher rent than such tenants were liable to pay. *Held* that the mortgage having been made in 1894, the provisions of the Agra Tenancy Act of 1901 did not apply and the mortgagor acquired no exproprietary rights in respect of the *sir*. *S* was therefore liable to pay rent at the rate mentioned in the *kabuliat*. *Madho Bharti* v. *Barti Singh* (1) followed.

THE facts of this case are as follows:—

One Ram Lal Singh executed a usufructuary mortgage of his zamindari and *sir* lands in favour of the plaintiff Lala Sheo Lal Singh and Rai Madan Makund Lal, on the 30th August 1894. On the next day, that is, on the 31st August 1894, Ram Lal's son executed a *kabuliat* in respect of the *sir* lands on an annual rent of Rs. 112. The son Sukhdeo Singh was living jointly with his father Ram Lal Singh and was interested in that holding jointly with his father. The plaintiff on the 16th August 1906 brought a suit for his share of the rent of holding for the years 1311, 1312 and 1313 F. The defence was that the relation of landlord and tenant did not exist between the parties, and that the *kabuliat* was illegal. The court of first instance gave the plaintiff a decree for the sum claimed. On appeal by the defendant the District Judge modified the decree of the first Court. The plaintiff appealed to the High Court. KARAMAT HUSAIN, J, holding that the *kabuliat* was not binding dismissed the appeal.

The plaintiff appealed under section 10 of the Letters Patent.

Munshi *Kalindi Prasad* (for whom Munshi *Gokul Prasad*) for the appellant, submitted that a zamindar, making a usufructuary mortgage of his *sir* land did not become an exproprietary tenant in respect of it. *Madho Bharti* v. *Barti Singh*, (1)

Babu *Mangal Prasad Bhargava*, for the respondent, replied.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit brought by the plaintiff appellant for arrears of rent against Sukhdeo Singh, respondent. It appears that in 1894 Ram Lal Singh the father of Sukhdeo Singh, executed a usufructuary mortgage of his zamindari and *sir* lands in favour of the plaintiff, and Rai Madan Makund, defendant. On the day following that of the mortgage Sukhdeo Singh executed a *kabuliat* in favour of the mortgagees in respect of the sir lands [illegible]

(1) (1894) I. L. R., 16 All., 337.

1909

SHEO LAL SINGH v. SUKHDEO SINGH.

to pay a rent of Rs. 112 per annum for the occupation of it. As Rai Madan Makund did not join in the suit the plaintiff claimed his share of the rent in accordance with the provisions of sub-section (3) of section 194 of the Agra Tenancy Act. The court of first instance decreed the claim but the lower appellate court modified that decree, holding that the plaintiff was not entitled to the rent mentioned in the *kabuliat* but only to such rent as an exproprietary tenant was liable to pay. This decree has been affirmed by the learned Judge of this Court who heard an appeal from the decision of the lower appellate court. Hence this appeal under the Letters Patent.

The learned Judge of this Court was of opinion that the defendant, who is joint with his father Ram Lal Singh, the mortgagor, had acquired exproprietary rights in regard to the *sir* land under section 7 of Act No. XII of 1881 and that consequently he was not liable to pay any higher rent than that which under that section an exproprietary tenant is liable to pay. This view is opposed to the Full Bench ruling in *Madho Bharti* v. *Barti Singh*(1). In that case it was held that a zamindar who makes a usufructuary mortgage of his zamindari including his *sir* land does not so lose or part with his proprietary rights within the meaning of section 7 of Act No. XII of 1881, as to become an exproprietary tenant of his *sir* land. This ruling does not appear to have been brought to the notice of the learned Judge of this Court. As the usufructuary mortgage in favour of the plaintiff and Rai Madan Makund was made in 1894, the provisions of the Agra Tenancy Act of 1901 do not apply, and the mortgagor acquired no exproprietary rights in regard to the *sir* lands. The defendant who executed a *kabuliat* agreeing to pay rent at the rate of Rs. 112 a year, was liable to pay the rent at that rate. The Court of first instance was therefore right in decreeing the plaintiff's claim. We allow the appeal, set aside the decrees of this Court and of the lower appellate court and restore that of the court of first instance with costs in all courts.

Appeal allowed.

(1) (1894) I. L. R., 16 All., 337.

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji,

1909
April 21.

BULAKI DAS (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL* AND OTHERS (DEFENDANTS).*

Act (Local) No. I of 1900 (Municipalities Act), section 183—Jurisdiction of Civil Courts.

A Municipal Board granted permission to *B* to build a temple. The District Magistrate acting under section 183 of the Municipalities Act made an order cancelling the permission given by the Municipal Board and the Local Government confirmed this order of the District Magistrate. *B* brought a suit for a declaration that he had a right to build the temple

Held that the suit was not maintainable, *held* further, that the Civil Court had no power to disturb the order of the District Magistrate who acted within his jurisdiction and whose order had been duly confirmed by the Local Government. *Abdul Aziz v. Municipal Board of Pilibhit* (1) followed.

THE facts of the case are as follows :—

In the city of Moradabad there is a sarai in which both Hindus and Muhammadans live. In the sarai there is a chabutra with an image of Shiva on it On the 3rd August 1905 the plaintiff Bulaki Das applied to the Municipal Board, Moradabad for permission to build a temple on the chabutra. The application was granted on the 25th October and the plaintiff commenced building operations. Subsequently some Muhammadan residents of the sarai submitted a petition to the District Magistrate of Moradabad protesting against the erection of the temple. On the 6th February 1906, the District Magistrate, acting under section 183 of the Municipalities Act (No. I of 1900,) cancelled the permission given by the Municipal Board. This order of the District Magistrate was confirmed by the Local Government on the 7th of March 1906. The plaintiff thereupon brought suit for a declaration that the plaintiff had a right to construct the temple. The court of first instance (Subordinate Judge of Moradabad) decreed the suit. The District Judge set aside the decree of the first court and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Durga Charan Banerjee* for the appellant submitted that section 183 of the Municipalities Act referred to matters falling within the scope of a Municipality. The remedy sought

*Second Appeal No 1391 of 1907, from a decree of W. F. Kirton, Additional District Judge of Moradabad, dated the 20th of August 1907, reversing a decree of Nihal Chandra, Subordinate Judge of Moradabad, dated the 15th of April 1907.

(1) (1905) 2, A. L. J. R., 221

1908

BULAKI DAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

by the civil suit was outside its scope. There was no legal bar to the suit. A Civil Court could consider the propriety of an order of the Local Government affecting the legal rights of a party and could give the declaration sought by the suit.

Maulvi *Ghulam Mujtaba* (with him Mr. *W. Wallach*) for the respondents, submitted that where a special tribunal was constituted to decide certain matters, the ordinary Civil Courts could not interfere. *Abdul Aziz* v. *The Municipal Board of Pilibhit* (1).

STANLEY, C. J., and BANERJI, J.—We think that the decision of the learned Additional Judge of Moradabad, from which this appeal is preferred, is correct. The plaintiff sued for a declaration that he is entitled to build a temple on a site in Moradabad. In a *sarai* in that city there is a *Chabutra* with an image of the god Mahadeo. It is said that there was formerly a *kuchha* temple upon this site which had fallen into ruin and that the plaintiff was desirous of restoring it. He applied to the Municipal Board on the 3rd of August 1905, for permission to build a temple on the *Chabutra* and his application was granted and the building was commenced. Later on, however, some Muhammadan members of the community protested against the building and, in consequence, the District Magistrate on the 6th of February 1906 cancelled the order of the Board in favour of the plaintiff, purporting to act under the provisions of section 183 of the Municipalities Act, Act I of 1900. The order of the District Magistrate was confirmed by the Local Government on the 7th of March 1906. The learned Additional Judge held that it was not open to the plaintiff to maintain his suit in view of the order of the District Magitrate. Hence this appeal.

We think that the view of the law taken by the learned Judge is correct. Section 183 provides that a District Magistrate may by an order in writing suspend within the limits of his district the execution of any order of the Municipal Board and may prohibit the doing within those limits of any act which is about to be done or is being done in pursuance of or under cover of the act, if in his opinion the doing of the act is likely to lead to breach of the peace, or cause injury or inconvenience to the

(1) (1905) 2, A. L. J. R., 222.

1909

BULAKI DAS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

public or any class or body of persons. The order of the District Magistrate cancelling the order of the Municipal Board, giving permission to the building of the temple in question, was passed in pursuance of this Act and it was confirmed by an order of the Local Government as provided for by subsection (2) of section 183. In view of this action of the District Magistrate we are of opinion that the plaintiff is not entitled to maintain a suit for a declaration that he is entitled to build despite the order so passed and confirmed. The principle governing the ruling of a Bench of this Court in the case of *Abdul Aziz* v. *The Municipal Board of Pilibhit* (1) appears to us to be applicable to this case. There it was held that where a Municipal Board acting under its statutory powers ordered the course of a drain which it considered to be prejudicial to health to be diverted, it was held that the Civil Court had no power to disturb the order of the Board inasmuch as it was acting within its statutory powers. So here we think that the Civil Court has no power to disturb the order of the District Magistrate, who acted within his jurisdiction and whose order has been duly confirmed by the Local Government. We dismiss the appeal with two separate sets of costs, one payable to the defendant No. 1 and one to other defendants respondents.

Appeal dismissed.

1909
April 23.

Before Mr. Justice Banerji and Mr. Justice Tudball.

KAMTA PRASAD AND ANOTHER (APPLICANTS) *v.* SAIYED AHMAD AND ANOTHER (OPPOSITE PARTIES).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 89 *and* 90.—*Two separate suits on two mortgages held by same person—Sale under the decree on the first mortgage—Paid off first mortgage and part of second mortgage—Application under section* 90—*No decree absolute.*

A person held two mortgages over the same property, brought two separate suits on those mortgages and obtained two decrees. The first decree was made absolute and in execution thereof the decree-holder himself purchased the property. The sale-proceeds discharged the decree on the first mortgage in full and the second decree in part. He then applied for a decree under section 90, Transfer of Property Act, to realise the balance due under the second decree. *Held* that no decree under section 90, Transfer of Property

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*Appeal No. 77 of 1908 under section 10 of the Letters Patent.

(1) (1905) 2, A. L. J. R., 221.

1909

KAMTA PRASAD v. SAIYED AHMAD.

Act, could be passed, as the second decree had not been made absolute under section 89, Transfer of Property Act, and no sale had taken place in execution thereof, the proceeds of which had proved insufficient to discharge the second mortgage. *Muhammad Akbar* v. *Munshi Ram* (1), and *Badri Das* v. *Inayat Khan* (2), followed.

THE fact of this case are fully set out in the following judgment of—

AIKMAN, J.—The appellants held two mortgages over the same property. They brought separate suits on their mortgages and in each suit got a decree for sale. The first decree was made absolute on the 28th of June 1902. In execution of the decree the property was brought to sale. At the sale the decree-holders caused notification to be made of the second mortgage decree which they held over the property, in order, as stated in their application, that "purchaser might not be under any misapprehension." This clearly implied that the decree-holders warned any intending purchaser who might buy the property that it was still liable to sale under the second mortgage decree. The decree-holders purchased a considerable portion of the mortgaged property themselves for a sum of Rs. 6,800. This satisfied the first decree and partly satisfied the second decree leaving a balance of over Rs. 1,133-7-0 due under the latter decree. By taking proceedings under section 295 of the Code of Civil Procedure, the decree-holders have realized this all but a sum of Rs. 321-10-7. For the recovery of this balance they applied for a decree under section 90 of the Transfer of Property Act. The court of first instance gave them a decree. On judgment debtor's appeal, the learned District Judge dismissed the application. The decree-holders come here in second appeal. It has been found on an issue referred by me that the unincumbered value of the share purchased by the appellants at the sale in execution of their first decree is Rs. 8,825 and to this finding no objection has been taken. In my opinion, applying the principles of the rulings in *Nand Kishore* v. *Hariraj Singh* (3), and *Bisheshur Dial* v. *Ram Sarup* (4), the purchase by the decree-holders under the circumstances stated above and on the finding on the issue

(1) Weekly Notes, 1899, p. 208.
(2) (1900) I. L. R., 22 All., 401.
(3) (1897) I. L. R., 20 All., 23.
(4) (1900) I. L. R., 22 All., 284.

referred to above, has the effect of discharging the balance due under the second mortgage decree. In my opinion the learned District Judge was right in holding that the appellants are not entitled to a decree under section 90 of the Transfer of Property Act. This appeal is dismissed with costs."

From this judgment the decree-holders preferred an appeal under section 10 of the Letters Patent.

Babu *Durga Charan Banerjee* (for whom Dr. *Satish Chandra Banerji*) for the appellants. The purchase of the mortgaged property by the mortgagees in execution of their first mortgage decree had not necessarily the effect of discharging the second mortgage. They could obtain a decree under section 90 of the Transfer of Property Act, when the mortgaged property was no longer available to them. *Bisheshur Dial* v. *Ram Sarup* (1), *Nand Kishore* v. *Raja Hari Raj Singh* (2).

Maulvi *Ghulam Mujtaba*, for the respondents. A decree under section 90 cannot be passed unless the decree-holder has obtained an order absolute under section 89, and the mortgaged property has been sold in pursuance of that order. *Muhammad Akbar* v. *Munshi Ram* (3), *Pirbhu Narain Singh* v. *Baldeo Misra* (4), *Kedar Nath* v. *Chandu Mal* (5), *Ram Ranjan Chakravarti* v. *Indra Narain Das* (6), *Badri Das* v *Inayat Khan*, (7).

Dr. *Satish Chandra Banerji*, in reply, submitted that it was not necessary for the purposes of getting a decree under section 90 that the decree-holder should have first sold the whole of the mortgaged property. He might abandon any portion of the mortgaged property and obtain a decree under section 90. *Ghafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan* (8), *Sheo Prasad* v. *Behari Lal* (9), *Pribhu Narain* v. *Amir Singh* (10), *Bageshri Dial* v. *Muhammad Naqi* (11).

In *Mastulla Mandal* v. *Jan Muhammad Shah* (12), it has been held that where the mortgaged property had been

(1) (1900) I. L. R., 22 All., 281
(2) (1897) I. L. R., 20 All., 23.
(3) Weekly Notes, 1899, p. 203.
(4) (1903) I. L. R., 29 All., 200.
(5) (1903) I. L. R., 26 All., 25.
(6) (1906) I. L. R., 33 Calc., 890.
(7) (1900) I. L. R., 22 All., 404.
(8) (1905) I. L. R., 28 All., 19.
(9) (1902) I. L. R., 25 All., 79.
(10) (1907) I. L. R., 29 All., 369.
(11) (1893) I. L. R., 15 All., 331.
(12) (1900) I. L. R., 28 Calc., 12.

1909

KANTA PRASAD v. SAIYED AHMAD.

sold away in execution of a rent decree under the Bengal Tenancy Act, the mortgagee decree-holder could apply for a decree under section 90. He also referred to *Gajadhar Lal* v. *The Alliance Bank of Simla, Ltd.* (1).

BANERJI AND TUDBALL, JJ.—This appeal arises out of an application for a decree under section 90 of the Transfer of Property Act. The appellants held two mortgages over the same property and brought two separate suits on the basis of those mortgages. They obtained two decrees, one on the 13th December 1901, and the other on the 2nd of March 1903. The decree first mentioned was made absolute on the 28th of June 1902, and in execution of it the property comprised in the mortgage was sold and the decree-holders themselves purchased it for Rs. 6,800. The decree upon the first mortgage was satisfied and the surplus of the sale proceeds discharged the amount of the second decree in part. A balance of Rs. 321-10-7 was left unsatisfied and it is for the realization of this balance that the present application for a decree under section 90 was made.

The court of first instance allowed the application. The lower appellate court dismissed it, and the order of that court was affirmed by the learned Judge of this Court by whom the appeal from the decree of the court below was heard. From the decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent.

Several questions, not free from difficulty, have been raised in the argument before us, but we think the contention of the learned vakil for the respondents, namely, that the decree-holders appellants are not entitled to a decree under section 90 of the Transfer of Property Act inasmuch as they did not obtain an order for sale under section 89 and did not cause the mortgaged property to be sold in pursuance of such order, is well founded. That section provides that if the proceeds of a sale directed by section 89 are insufficient to satisfy the mortgage, a decree may be passed for the balance. In this case no order was obtained under section 89 and no sale took place in pursuance of such an order. It was held in *Muhammad Akbar* v. *Munshi Ram* (2), which was followed in the case of *Badri*

(1) (1906) I. L. R., 28 All., 660. (2) Weekly Notes, 1899, p. 203

Das v. *Inayat Khan* (1), that if a sale had taken place under a decree on a prior mortgage, that would not entitle a subsequent mortgagee, who had also obtained a decree for sale to apply for and obtain a decree under section 90. We are bound by these rulings. It cannot be said that in this case the mortgaged property was sold under the decree passed on the second mortgage. The decree-holders made an application in the execution proceedings relating to the first decree asking the court to inform intending purchasers of the existence of the decree on the second mortgage. If the property be regarded as having been sold subject to the second mortgage, the decree-holders had the right to get the property re-sold under the second mortgage. It so happens that they themselves are purchasers under the sale which took place in execution of the decree under the first mortgage. Unless therefore they surrender the property and have it resold in execution of the decree under the second mortgage they cannot ask for a decree under section 90 of the Transfer of Property Act. The other rulings which were referred to in the argument do not touch the point before us and are clearly distinguishable. For the above reasons we are of opinion that the order of the lower appellate court, which has been confirmed by the learned judge of this Court, dismissing the application for execution, is correct though not on the ground on which the order was passed. The case relied upon by the learned Judge of the lower appellate court, namely *Bageshri Dial* v. *Muhammad Naqi* (2) was considered in *Muhammad Akbar* v. *Munshi Ram* to which we have referred above. The question before us did not arise in that case. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1900) I. L. R., 22 All., 404. (2) (1893) I. L. R., 15 All., 331

1909
April 30.

Before Mr. Justice Banerji and Mr. Justice J. Tudball.

SARJU AND OTHERS (APPLICANTS) *v.* DISTRICT JUDGE OF BENARES (OPPOSITE PARTY).*

Act No. VIII of 1890 (Guardian and Wards' Act), section 29—Mortgage of minor judgment debtor's propetry—Sanction of District Judge.

The guardian of a minor judgment-debtor, appointed under the Guardian and Wards Act, must obtain the permission of the District Judge under section 29 of the Act to sell or mortgage the property of the minor which is under attachment in execution of a decree even if the Court executing the decree gives leave under section 305 of the Code of Civil Procedure.

THE facts of this case appear from the judgment.

Babu *Harendra Krishna Mukerji*, for the appellant.

Mr. *W. Wallach*, for the respondent.

BANERJI and TUDBALL, JJ.—This is an appeal from an order refusing to grant permission, under section 29 of the Guardian and Wards' Act, to a guardian to mortgage the property of his wards. It appears that a decree was obtained against the minors on a mortgage executed by their father. The guardian of the minors who had obtained a certificate of guardianship made an application to the District Judge, under section 29 of the Guardian and Wards' Act (VIII of 1890), for permission to mortgage the property of the minors for Rs. 800, the value of the property being alleged to be Rs. 1,500. The learned Judge refused to entertain the application on the ground that permission to mortgage should have been first obtained from the court executing the decree. He was of opinion that unless the Court executing the decree gave permission to the applicant to raise the amount of the mortgage decree by private sale or mortgage, the learned District Judge had no power to allow him to deal with the property. He apparently referred to the provisions of section 305 of the Code of Civil Procedure, 1882. We are of opinion that even if section 305 of Act XIV of 1882 applied to a case like this and even if the court executing the decree granted time to the judgment-debtors to raise money by private alienation of the property ordered to be sold, it would still be necessary for the guardian of minor judgment-debtors to obtain the permission of the District Judge, under section 29 of Act VIII of 1890, to make a sale or mortgage of the property.

*First Appeal No. 20 of 1909, from an order of G. A. Paterson, District Judge of Benares, dated the 13th of January 1909.

That section forbids the guardian to mortgage or charge the immoveable property of his ward without the previous permission of the District Judge. Therefore, in any case, if the guardian sought to mortgage the property of his ward, the permission of the District Judge was absolutely necessary. As such permission was asked for, the learned District Judge ought to have proceeded under section 29 of Act No VIII of 1890, to decide whether or not he would grant it. We think the learned Judge was wrong in refusing to entertain the application of the guardian. We accordingly allow the appeal and setting aside the order of the court below send back the case to that court, with directions to restore the appellant's application to the file of pending cases and dispose of it according to law.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Tudball.

1909
April 30.

GHANSHYAM LAL (JUDGMENT-DEBTOR) *v.* RAM NARAIN (DECREE-HOLDER).*

Execution of decree—Conditional decree—Smaller sum payable if payment made within a time fixed by court—Decree of first court fixing time for deposit of money—Decree affirmed by High Court and by Privy Council—Money not paid in within time fixed by first Court—No extension allowed.

A plaintiff claimed the principal sum of money due on a bond with interest at 30 per cent. per annum and the decree of the court of first instance directed that if the defendant deposited the money within three months from the date of its decree, he would be liable to pay interest at the rate of 12 per cent. per annum and would be exempted from further liability. This decree was affirmed by the High Court and finally by the Privy Council but the time for payment was not extended. *Held* that the defendant having made default in the payment of the money within the time allowed by the first court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 12 per cent. from the date of the Privy Council decree.

THE facts of this case are as follows:—

One Ram Narain brought a suit for Rs. 5,600 principal and Rs. 4,938-12-0, interest, in the court of the Subordinate Judge, Agra, against Ghanshyam Lal. That suit was decreed on the 2nd June 1900, with full costs and future interest at 6 per cent. per annum subject to the condition that if the judgment-debtor paid the principal amount (Rs. 5,600) with full

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* First Appeal No. 215 of 1907, from a decree of Jagat Narayan, B.A., Subordinate Judge of Agra, dated the 15th of April 1907.

1909

GHANSHYAM LAL v. RAM NARAIN.

costs and interest at 1 per cent. per month till the date of payment within three months of the date of the decree, he would be exempted from further liability, otherwise he would have to pay the whole amount claimed with costs. The decree was in the following terms:—

It is ordered and decreed that the plaintiff's claim for Rs. 10,538-12-0 together with the entire costs of the Court and future interest at the rate of Rs. 6 per cent. per annum be decreed on condition that if the defendant will within three months from to-day pay the entire principal amount (Rs. 5,000) and costs and interest at the rate of Re. 1 per cent. per month up to the date of realization, he shall be exempt from further liablity, otherwise he shall have to pay (to the plaintiff) the entire amount claimed and costs.

Instead, however, of complying with the decree of the Court within three months, the judgment-debtor appealed to the High Court but his appeal was dismissed. The judgment-debtor then appealed to the Privy Council; but the appeal also failed. When the decree-holder applied for execution of his decree, the judgment-debtor claimed the benefit of the decree of the Subordinate Judge by depositing the principal amount with interest at 1 per cent. per month within three months from the decree of the Privy Council and prayed that satisfaction of the decree be entered. The Court disallowed the judgment-debtor's objection. The judgment-debtor appealed to the High Court.

Mr. *C. Dillon* (with him Munshi *Gulzari Lal*), for the appellant, submitted that the judgment-debtor could pay the principal amount with interest at Re. 1 per cent. per month within three months of the date of the decree of the Privy Council as the original decree and that of the High Court had merged in the decree of the Privy Council. He cited *Nur Ali* v. *Koni Meah* (1), *Luchmun Persad* v. *Kishun Prasad* (2).

Dr. *Satish Chandra Banerji*, for the respondent.

BANERJI and TUDBALL, JJ.—This is a judgment-debtor's appeal and arises out of proceedings relating to the execution of a decree passed by the court of first instance on 2nd June 1900, which was affirmed by the High Court on 19th January 1903, and by the Privy Council on the 16th November 1906. The

(1) (1886) I. L. R., 13 Calc., 13. (2) (1882) I. L. R., 8 Calc., 218.

decree of the court of first instance awarded to the plaintiff the amount claimed by him with costs and future interest, but declared that if the appellant, within three months of the date of the decree, paid the principal sum claimed by the respondent, together with costs and interest at the rate of 12 per cent. per annum he would be exempted from further liability. The plaintiff, it appears, had claimed interest at the rate of 30 per cent. *per annum*, so that according to the decree of the court of first instance if the judgment-debtor paid the principal amount with interest at 12 per cent. per annum within three months from the date of the decree of that court, *i e.*, on or before the 2nd September 1900, he would be exempted from further liability under the decree, and would not have to pay interest at the higher rate. He did not make any payment and he now contends that he can pay the principal amount with interest at 12 per cent. per annum within three months from the date of the decree of the Privy Council. It is no doubt true that the decree of the Privy Council is the final decree in the cause of which execution should be taken out, but that decree does not extend the time for payment of the decretal amount. It affirms the decree of the High Court which again affirmed the decree of the court of first instance, including that part of the operative portion of the decree which directs payment of the principal amount with interest at 12 per cent. per annum within three months from 2nd June 1900, the date of the decree. We think the court below was right in holding that the judgment-debtor, having allowed the three months granted to him by the court of first instance to elapse, is not entitled to claim a further period of three months from the date of the decree of the Privy Council. The case of *Nur Ali Chowdhuri* v. *Koni Meah* (1), relied on by the learned counsel for the appellant depended on the terms of section 52 of Bengal Act VIII of 1869 and does not, in our opinion, help the appellant. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1886) I. L. R , 13 Calc., 13.

1909
May 3.

Before Mr. Justice Banerji and Mr. Justice Tudball,

AMINA BIBI AND OTHERS (JUDGMENT-DEBTORS) *v.* NAJMUN-NISSA (DECREE-HOLDER).*

Act No. XXIII of 1871 (Pensions Act) section 11—Immovable property granted in lieu of pension—Not a pension—Liable to attachment—Code of Civil Procedure (Act No. XIV of 1882), section 266 (g).

Where certain immovable property was granted in lieu of a pension and the sanad provided that upon the death of the original grantee the estate would be continued in perpetuity in the manner of an hereditary holding (*zamindari mauroosi*) and at the desire of the grantee revenue was assessed and the members of the family had treated it as ordinary zamindari property, subject simply to the payment of Government revenue, *held* that the zamindari so granted was not a pension within the meaning of section 11 of the Pensions Act, and was liable to attachment and sale in execution. *Lachmi Narain* v. *Makund Singh* (1) and *Secretary of State for India* v. *Khemchand Jaychand* (2) followed

THE facts of this case are as follows:—

One Kadir Bakhsh, a Pindari Chief, from whom appellants are descended, was granted by the Government a political pension of Rs 4,000 a year. The Government by a *sanad* dated the 14th of January 1819, bestowed on Kadir Bakhsh, in lieu of this pension, a revenue free *jagir* consisting of 27 villages in one *Taluqa* in Gorakhpur. The *sanad* lays down the following provisions:—" . . . On the decease of Kadir Bakhsh, the estate will be continued in perpetuity in the manner of an hereditary holding, *zamindari mauroosi*, in possession of heirs and successors, provided that an adequate payment of revenue be made to Government." In the year 1822, the revenue was assessed on the estate at the request of Kadir Bakhsh. Since then the property had all along been treated by the members of Kadir Bakhsh's family as an ordinary zamindari holding. The respondent decree-holder attached the property in execution of her decree against the appellants, who contended that the property being in the nature of a political pension could not be attached in execution of the decree. The Additional Subordinate Judge disallowed the judgment-debtors' objection. The judgment-debtors appealed to the High Court.

Mr. *Abdul Raoof*, for the appellants. The property really belongs to the Government and the appellants have only a right to recover from it the pension granted by Government originally

* First Appeal No. 228 of 1908, from a decree of Gur Prasad Dube, Additional Subordinate Judge of Gorakhpur, dated the 28th of July 1908.

(1) (1904) I. L. R., 26 All., 617. (2) (1880) I. L. R., 4 Bom., 432.

1908

AMNA BIBI
v.
NAJM-UN-NISSA.

to their ancestor Kadir Bakhsh, and therefore it must be treated as a political pension. It is not liable to attachment in execution of the decree. *Civil Procedure Code*, 1882, *section* 266 (*g*). *Pensions Act, XXIII of* 1871, *section* 1. *F. A.* 32 *of* 1878, *decided on November* 27, 1878, (*unreported*).

Maulvi *Muhammad Ishaq*, for the respondent, relied on *Lachmi Narain* v. *Makund Singh* (1). *The Secretary of State for India in Council* v. *Khemchand Jaychand* (2).

BANERJI and TUDBALL, JJ.—This appeal arises out of an application for execution of a decree by the respondent Musammat Najm-un-nissa Bibi, who has obtained a decree for dower against the other heirs of her deceased husband. The decree is dated 16th August 1904. In execution of that decree she has attached some 21 villages in the hands of the judgment-debtors appertaining to *taluqa* Ganeshpur. The judgment-debtors have objected to this attachment on the ground that the property constitutes a political pension within the meaning of section 266 (*g*) of the Code of Civil Procedure of 1882. The lower court has held against them and they have come on appeal to this court.

The sole question for decision is whether the property attached can be considered to be a political pension within the meaning of section 266 (*g*) of the Code.

The parties are the descendants of one Kadir Bakhsh, a Pindari Chief, who in the earlier part of the nineteenth century was granted by the Government of India a pension of Rs. 4,000 per annum. In the year 1819, by a *sanad* dated the 14th of January of that year the Government of India bestowed on Kadir Baksh, *in lieu of his so-called pension*, a revenue free *jagir* consisting of 27 villages. The *sanad* runs as follows (after relating the facts of the grant to Kadir Baksh), "on the decease of Kadir Bakhsh the estate will be continued in perpetuity in the manner of an hereditary holding, *zamindari mauroosi*, in possession of his heirs and successors, provided that an adequate payment of revenue be made to Government." Subsequently in the year 1822, at the request of Kadir Baksh himself, revenue amounting to Rs. 1,877-8-0 was assessed on this estate, to come into force on the decease of Kadir Baksh. From that time the heirs of Kadir

(1) (1884) I. L. R., 6 All., 617. (2) (1880) I. L. R., 4 Bom., 432.

1909

AMNA BIBI v. NAJM-UN-NISSA.

Baksh, have held this estate on the payment of this permanent revenue to Government. Subsequently in the year 1862, the predecessors in title of the present parties brought a suit against the Government claiming the full proprietary right as zamindars over an area of 8,000 odd bighas (part of the estate granted by the *sanad*). That case proceeded on the assumption that Kadir Baksh was the full owner of 3,933 bighas, the balance of the property. The question of the full ownership of this portion of the estate was not in dispute. The plaintiffs in that case obtained from their Lordships of the Privy Council on the 22nd of February 1870, a decree for possession as full proprietors and zamindars of the entire area of 8,000 odd bighas. It also appears that subsequently to this various portions of this estate have been sold by public auction and have also been transferred by co-sharers therein. So that it is clear that the property has all along been treated by the members of this family as an ordinary zamindari holding, subject simply to the payment of Government revenue.

The contention for the appellants is that the property really belongs to the Government and the appellants have only a right to recover from it their pension granted by Government originally to Kadir Baksh, and that therefore the property must be treated as a political pension and not liable to attachment in execution of the decree. A similar question arose in the case of *Lachmi Narain* v. *Makund Singh* (1). It was therein held that the zamindari granted by Government as a reward for services rendered is not a pension and its alienation by the grantee is not prohibited either by Act XXIII of 1871 or by section 266 of the Code of Civil Procedure. At page 621 of the Report the learned Judges held as follows:—"We have no doubt that the word "pension" in section 11 of the Pensions Act and in section 266 of the Code of Civil Procedure implies periodical payments of money by Government to the pensioner in the manner prescribed by section 8 of the Act." The learned Judges also quoted the case of the *Secretary of State for India in Council* v. *Khemchand Jaychand* (2), where the same questions also arose and was decided and in which it was held as follows:—"It follows that in our opinion the word "pension" in section 11 is used in

(1) (1904) I. L. R., 26 All., 617. (2) (1880) I. L. R., 4 Bom. 432.

its ordinary and well-known sense, namely that of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services, or particular merits, or as compensation to dethroned princes, their families and dependents." With this definition we fully concur and it is very difficult to see how the zamindari which was granted under the *sanad* of the 14th of January 1819, can now be deemed a political pension.

Our attention has been called to the decision of a Bench of this court in an unreported case, case no. 32 of 1878, dated the 27th of November 1878. It appears that at the time when this grant was made to Kadir Baksh a similar grant was made to another Pindari chief named Karim Baksh under another *sanad*, practically worded the same as the one in this case. It was held by the learned Judges who decided that case that the property was not liable to attachment. The judgment runs as follows: "It appears that a necessary allowance in the nature of a political pension was originally granted to the ancestor of the judgment-debtor, a Pindari chief Karim Khan. For their necessary allowance a grant of the *taluka* at a given rent was substituted. The Government has from 1846 up to the present time asserted that the grant was a *jagir* escheating to the Government on failure of the *jagirdar's* heirs and which the *jagirdars* for the time being are incompetent to alienate. We may refer to the letter No. 2367 of 1846 from the Secretary to Government to the Secretary, Sudder Board of Revenue, the letter of the Commissioner of the Southern Division to the Sudder Board, dated 6th June 1853, and No. 205 and to the letter No. 224 from Secretary to Sudder Board to the Commissioner of the Benares Division, 17th June, 1853." It does not appear from this judgment that the terms of the *sanad* were at all considered. It is based on certain correspondence which was before the learned judges but which is not before us and which moreover does not relate to the present estate. The circumstances of that case appear to have been somewhat different to those of the case before us. In view of the recent ruling of this Court mentioned above and of the circumstances of this case set forth, we find it impossible to hold that the attached property can in any way be considered a political pension and

1909

AMNA BIBI v. NAJM-UN-NISSA.

therefore not liable to attachment and sale. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P.C. 1909 *March* 19 *May* 11.

MANESHAR BAKHSH SINGH (DEFENDANT) *v.* SHADI LAL AND OTHERS (PLAINTIFFS.)

[On Appeal from the Court of the Judicial Commissioners of Oudh Lucknow.]

Contract Act (IX of 1872), section 16 as amended by Act VIII of 1899—Suit on Bond—Debtor and creditor—Disqualified proprietor whose estate was under control of Court of Wards—Exercise by creditor of Undue Influence—Unconscionable Transaction—Compound interest—Onus of proof of Undue Influence.

This was an appeal by the defendant, a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) whose property, on the ground of his indebtedness and consequent inability to manage it, had been placed in charge of the Court of Wards. Whilst it was under their control and without their sanction he executed on 27th January 1896, in favour of the plaintiff, a bond by which he contracted to pay in two years with interest and compound interest with yearly rests, the sum of Rs. 9,950 which was due on a former bond dated 14th September 1889 executed by him for a loan of Rs. 4,000 in favour of the same creditor. No actual money consideration therefore passed at the execution of the bond in suit. The defendant's estates were restored to him in July 1898, and on 25th January 1904 the plaintiff brought a suit for Rs. 32,877 principal and interest due on the bond. The defence was that the bond was obtained by "undue influence", and that it was an unconscionable transaction. Both the courts below placed the onus on the defendant to prove undue influence, and found that he had failed to do so and that the transaction was not unconscionable.

Held by the Judicial Committee (reversing the decisions of the Courts in India) following the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), in which the same defendant as in the present case was the borrower that he was (as in that case) placed in such a condition of helplessness that the plaintiff was in a position "to dominate his will" within the meaning of section 16 of the Contract Act (IX of 1872) as amended by Act VIII of 1899, and that he used that position to obtain an unfair advantage over the defendant.

Under the circumstances the bond was set aside, and a decree passed for the original sum of Rs. 4,000 with simple interest at 18 per cent. per annum from 14th September 1889 to the date of payment.

Present:—Lord ATKINSON, Lord COLLINS, Lord SHAW, and SIR ARTHUR WILSON.

(1) (1906) I. L. R., 28 All., 570: L. R., 33 I. A., 118.

1909

MANESHAR BAKHSH SINGH *v.* SHADI LAL.

APPEAL from a judgment and decree (1st May 1905) of the Court of the Judicial Commissioners of Oudh which affirmed a a decree (12th August 1904) of the Subordinate Judge of Bahraich decreeing the respondents' suit.

The suit was brought to recover the principal and interest due on a registered bond, and the questions for determination on this appeal were whether the execution of the bond was obtained by the exercise of undue influence, and whether the transaction was in itself unfair and unconscionable, so as to relieve the appellant from a strict compliance with the provisions of the bond.

The bond was executed by the appellant on 27th January 1896 in favour of the managing members of a joint Hindu family carrying on business as bankers and now represented by the respondents. It was executed in renewal of a previous bond dated 14th September 1889, the consideration of which was an advance of Rs. 4,000, and on which at the time of the execution of the bond in suit there was an amount of Rs. 9,950 due. No actual money consideration therefore passed at the time of execution. The terms were that the sum of Rs. 9,950 was to be paid by the appellant within two years with interest and compound interest at the rate of 18 per cent. per annum with yearly rests.

The appellant was the taluqdar of Mallanpur, in the district of Sitapur who, in 1886 being heavily in debt, was in consequence, on his own application declared a disqualified proprietor under the provisions of the Oudh Land Revenue Act, (XVII of 1876) and his estate was taken under the management of the Court of Wards in August 1886. During the time his estate was under control of the Court of Wards he received an allowance of Rs. 1,250 per month, and was also granted a lease of certain villages. Being in want of funds the respondents' firm, among other money lenders made advances to him, and one of the loans so made was under the bond of 14th September 1889 which was executed without the sanction of the Court of Wards. In July 1898, the Court of Wards restored to the appellant the management of his estate, and on 25th January 1901 the respondents instituted the suit out of which their appeal arose to

1909

AMNA BIBI v. NAJM-UN-NISSA.

therefore not liable to attachment and sale. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P.C. 1909 *March* 19 *May* 11.

MANESHAR BAKHSH SINGH (DEFENDANT) *v.* SHADI LAL AND OTHERS (PLAINTIFFS.)

[On Appeal from the Court of the Judicial Commissioners of Oudh Lucknow.]

Contract Act (IX of 1872), section 16 as amended by Act VIII of 1899—Suit on Bond—Debtor and creditor—Disqualified proprietor whose estate was under control of Court of Wards—Exercise by creditor of Undue Influence—Unconscionable Transaction—Compound interest—Onus of proof of Undue Influence.

This was an appeal by the defendant, a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) whose property, on the ground of his indebtedness and consequent inability to manage it, had been placed in charge of the Court of Wards. Whilst it was under their control and without their sanction he executed on 27th January 1896, in favour of the plaintiff, a bond by which he contracted to pay in two years with interest and compound interest with yearly rests, the sum of Rs. 9,050 which was due on a former bond dated 14th September 1889 executed by him for a loan of Rs. 4,000 in favour of the same creditor. No actual money considera-tion therefore passed at the execution of the bond in suit. The defendant's estates were restored to him in July 1898, and on 25th January 1904 the plain-tiff brought a suit for Rs. 32,877 principal and interest due on the bond. The defence was ... bond was obtained by "undue influence", and that it ... onus on ... d to do so

Held by the Judicial Committee (reversing the decisions of the Courts in India) following the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), in which the same defendant as in the present case was the borrower that he was (as in that case) placed in such a condition of helplessness that the plaintiff ... the meaning of section 16 of ...

Under the circumstances the bond was set aside, and a decree passed ... the original sum of Rs. 4 000 with simple interest at 18 per cent. per annum from 14th September 1889 to the date of payment.

Present :—Lord ATKINSON, Lord COLLINS, Lord SHAW, and SIR ARTHUR WILSON.

(1) (1906) I. L. R., 28 All., 570: L. R., 33 I. A., 118.

APPEAL from a judgment and decree (1st May 1905) of the Court of the Judicial Commissioners of Oudh which affirmed a a decree (12th August 1904) of the Subordinate Judge of Bahraich decreeing the respondents' suit.

The suit was brought to recover the principal and interest due on a registered bond, and the questions for determination on this appeal were whether the execution of the bond was obtained by the exercise of undue influence, and whether the transaction was in itself unfair and unconscionable, so as to relieve the appellant from a strict compliance with the provisions of the bond.

The bond was executed by the appellant on 27th January 1896 in favour of the managing members of a joint Hindu family carrying on business as bankers and now represented by the respondents. It was executed in renewal of a previous bond dated 14th September 1889, the consideration of which was an advance of Rs. 4,000, and on which at the time of the execution of the bond in suit there was an amount of Rs. 9,950 due. No actual money consideration therefore passed at the time of execution. The terms were that the sum of Rs. 9,950 was to be paid by the appellant within two years with interest and compound interest at the rate of 18 per cent. per annum with yearly rests.

The appellant was the taluqdar of Mallanpur, in the district of Sitapur who, in 1886 being heavily in debt, was in consequence, on his own application declared a disqualified proprietor under the provisions of the Oudh Land Revenue Act, (XVII of 1876) and his estate was taken under the management of the Court of Wards in August 1886. During the time his estate was under control of the Court of Wards he received an allowance of Rs. 1,250 per month, and was also granted a lease of certain villages. Being in want of funds the respondents' firm, among other money lenders made advances to him, and one of the loans so made was under the bond of 14th September 1889 which was executed without the sanction of the Court of Wards. In July 1893, the Court of Wards restored to the appellant the management of his estate, and on 25th January 1901 the respondents instituted the suit out of which their appeal arose to

1909

MANESHAR BAKHSH SINGH v. SHADI LAL.

recover the sum of Rs. 32,877 as payable on the bond of 27th January 1896.

The defence was that the bond was obtained by undue influence, and was "an unconscientious transaction," and issues were raised on those points.

Previous to the hearing of the present case in the courts in India another case against the present defendant by another money lender named Auseri Lal in favour of whom the defendant had executed a bond whilst the estate of Mullanpur was under the management of the Court of Wards, had come before the Courts in Oudh, and on an appeal in the suit the then Judicial Commissioners of Oudh had held on 3rd June 1902 that the defendant was entitled to be relieved from the strict terms on the bond on the grounds that undue influence had been exercised over him in obtaining it, and that it was an "unconscionable bargain". That case, the Judicial Commissioners' judgment in which was afterwards (on 10th May 1906) confirmed by the Judicial Committee of the Privy Council in *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), was distinguished from the present case by the Courts in India, which also expressed dissent from the law as propounded by their predecessors in office.

The Subordinate Judge in the present case found that the defendant had failed to prove the exercise of undue influence over him in the execution of the bond, and there was nothing unusual or unconscionable in the rate of interest. He therefore made a decree in favour of the plaintiffs for the amount claimed with future interest and costs.

The Court of appeal (Mr. A. E. RYVES, First Additional Judicial Commissioner, with whom Mr. W. F. WELLS, Second Additional Judicial Commissioner concurred) after referring to the English and Indian cases which had been cited in argument, and reading clauses 1 and 3 of section 16 of the Contract Act (IX of 1872) as amended by section 2 of Act VI of 1899, proceeded,

"Before the Court can avoid a contract on the ground that it was induced by undue influence it must find on the evidence that one of the parties thereto was in a position to dominate the will of the other and used that position to

(1) (1906) I. L. R., 28 All., 570 : L. R., 33 I. A., 118.

1909

MANESHAR BAKHSH SINGH *v.* SHADI LAL.

obtain an unfair advantage over the other. The third clause, on which much stress has been laid, seems to be scarcely applicable. However, assuming that it is, it only provides that when one party to a contract is in a position to dominate the will of another and makes a contract with that other person, which *primâ facie* appears to be unconscionable, then the *onus* of proof of its fairness lies on him. It is after all only a matter of evidence in each case. Each case must stand or fall on its own merits. In this case the plaintiff was examined and cross-examined and all the evidence that the defendant put forward was recorded. After examining the evidence of both sides the Court below has upheld the contract and I think rightly."

The Court then examined the whole evidence in the case and agreed with the Subordinate Judge that undue influence had not been proved, and continued:

"The only other point that I need consider is whether the contract was unconscionable. I do not think it was. It was argued on behalf of the appellant that although 18 per cent compound interest may not be unusual yet in the present case it was excessive. There had been previous loans advanced by the plaintiff to the Raja before his disqualification on the same terms, and in some cases on even higher terms in which besides his personal security landed property had been hypothecated. These debts had not been discharged by the Raja. The Court of Wards had discharged them. Because he had not paid up those debts, it was argued he could not have paid them. If then the plaintiff knew, as he must have known, that even before his disqualification the Raja could not pay off previous debts carrying interest at 18 per cent, he most certainly knew that after his disqualification when he had only his monthly "pittance" of Rs 1,250 and what he could make out of the leased villages he would be unable to pay anything towards the discharge of fresh debts, and that, therefore, under the circumstances, knowing the man he was dealing with, it was unconscionable on the part of the plaintiff to insist on so high a rate of interest. I see no force in the argument. No sane money-lender would lend money to a disqualified proprietor on easier terms after his disqualification than what before disqualification had been accepted as reasonable by both, for his security was immeasurably reduced and the chance of recovering his money rendered very remote. The previous dealings between the parties, when there is no suggestion of any undue influence, and experience in other cases abundantly proves that the rate of interest charged was under the circumstances by no means excessive."

On these grounds the decree of the Subordinate Judge was affirmed and the appeal dismissed with costs.

Leave to appeal to His Majesty in Council was refused by the Court of the Judicial Commissioner, but special leave to appeal was granted to the appellant by order in Council, dated 1st March 1907.

On this appeal,

1909

MANESHAR BAKHSH SINGH v. SHADI LAL.

De Gruyther, K.C., and *S. A. Kyffin*, for the appellant contended that on the true construction of section 16 of the Contract Act (IX of 1872) and the facts proved by the evidence the appellant was entitled to be relieved from strict compliance with the provisions of the bond in suit; and it was pointed out that the judgments of the courts in India were opposed to the decision of their Lordships of the Privy Council in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1) which it was submitted governed the present case unless it could be distinguished by the respondents, or unless the burden of proof should be held to be on the appellant.

Ross for the respondents contended that the courts below had distinguished the present case from the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), and had arrived at concurrent holdings on the facts of this case. The main facts on which the cases differed were that in the present case the intention of the parties was that the greater portion of the Rs. 4,000 principal of the bond of 14th September 1889 should be paid by means of the income of the villages of which the appellant had the lease; that the sums of Rs. 500 had actually been paid to the respondents towards payment of the bond for Rs. 4,000; that Rs. 2,500 had admittedly been paid on the bond in suit though after the release of the appellant's estate from the Court of Wards; that the respondents used to make frequent demands for their money; and that the bond in suit fixed two years for payment of the money showing that the parties intended the debt to be paid soon. In the case of *Dhanipal Das* the bond was for a term of seven years; and in a passage from the judgment of the Judicial Commissioners in that case they said, "It is clear that both parties knew that the simple interest would not be paid and that compound interest would accrue due and that the principal amount would not be paid, while the estate of the defendant was in the charge of the Court of Wards, and that neither of them intended that anything should be paid while the estate was in the charge of the Court. There is a reasonable presumption that the improvidence of the defendant

(1) (1903) I. L. R., 28 All., 570 : L. R. 33 I. A., 118.

and his need, or imaginary need of money, placed him in the plaintiff's power and that the plaintiff took advantage of such power to induce the defendant to make promises which there was no intention that he should fulfil until an event, the time of the happening of which was uncertain, happened, and which promises as long as they were not fulfilled, gave rise to heavy pecuniary liabilities. The plaintiff did not enter into the transactions as a fair matter of business, but in the hope that the event would not happen, and that the defendant's promises would remain unfulfilled. His sole object was that the defendant might become heavily indebted to him before the event happened he looking to the happening of the event to realize the amount of the debt."

In the present case the Judicial Commissioners say of that passage, "Now in this case the evidence, which I shall examine, could not, I think, support similar findings. That in itself is enough to distinguish the two cases. The plaintiff or rather his deceased partner lived in Bahraich. He had money dealings previously with the Raja. Those debts were paid off when the estate was brought under the Court of Wards. This fact, it seems to me, proves conclusively that the Raja himself could have equally well paid them off if he had chosen to do so." In this case also, on the findings of both the courts below there was no unfair advantage taken of the appellant. It was submitted that the Judicial Commissioners had rightly held that the bond in suit was not the result of the exercise of "undue influence" on the part of the creditors, and that the terms of the bond were not in themselves unfair or unconscionable.

De Gruyther, K. C, replied.

1909, *May* 11*th* :—The judgment of their Lordships was delivered by LORD COLLINS:—

This is an appeal by the defendant, a disqualified proprietor under the provisions of the Oudh Land Revenue Act 1876, against the judgment of the Court of the Judicial Commissioner of Oudh, affirming a decision of the Subordinate Judge of Bahraich in favour of the plaintiffs suing to recover money secured by a bond dated the 27th January 1896 whereby the defendant contracted to pay within two years to the plaintiffs

1909

MANESHAR BAKHSH SINGH
v.
SHADI LAL.

(or their predecessors in title) a sum of Rs. 9,950 with interest and compound interest at the rate of Rs 18 per cent. per annum, with yearly rests. There was practically no consideration paid at the time of the execution of the bond, which was given in renewal of a previous one dated the 14th September 1889, the consideration for which was an advance of Rs. 4,000 The Raja was a person of extravagant habits, and when his estate was placed under the Court of Wards, as it was, at his own instance, in August 1886, his debts were said to have amounted to about seven or eight lakhs of rupees. The bond in suit was given without the knowledge or consent of the Court after his estate had been taken over. The defence was that, in the circumstances, the bond ought to be treated as given under undue influence and as unconscionable. It was assumed both in the Court of first instance and in the Court of the Judicial Commissioner that the onus of proving undue influence was upon the appellant. In this respect the said decisions are directly opposed to that of this Board in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh*, the present appellant (1), decided in respect of another loan by the then plaintiff (one Auseri Lal) to the present appellant while under disqualification. In that case—which was as nearly as possible identical in its facts with that under appeal, except that the moneylender was a different person, though the borrower was the same—their Lordships in referring to the evidence, say (at p. 126 of 33 I. A.):—

"The fair result . . . is that the respondent, through his improvidence, was in urgent need of money, and owing to his estate being under the care of the Court of Wards, he was in a helpless position. There was no fraud in the matter, and no pressure was put upon the respondent by Auseri Lal . . . . to induce him to accept the conditions offered to him . . . But it must be taken that the respondent was compelled by his circumstances to accept the terms which were offered to him . . . Their Lordships are of opinion that, although the respondent was left free to contract debt, yet he was under a peculiar disability, and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some 50 years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was 'in a position to dominate the will' of the respondent within the meaning of the amended section 16 of the Indian Contract Act

(1) (1906) I. L. R., 28 All., 570: L. R. 33 I. A., 118.

It remains "to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent."

Their Lordships then draw the conclusion that the Subordinate Judge, who had found that simple interest at 18 per cent. per annum was not high, must be taken to have found that the charging of compound interest in the circumstances was unconscionable, a conclusion in which they deemed the Court of the Judicial Commissioner to have concurred, and, in the result, their Lordships held that the lender used his position to demand and obtain from the respondent more onerous terms than were reasonable and that the bond sued on must be set aside. It is true that the learned Judges in the present case took a different view of the relative position of the parties under section 16 of the Indian Contract Act, 1872, which in itself would be sufficient to account for their differing conclusion as to the proper inference to be drawn from facts in all essential points identical with those in the earlier case. Moreover, the Judicial Commissioners seemed to regard themselves as free to criticise, and apparently not to follow, the decision of their predecessors in the same Court in *Dhanipal Das's* case. Indeed, the main reasoning of both the learned Judges seems to be addressed to impugning the position expressly asserted in the judgment of this Board that, in the case of a disqualified proprietor whose estate was under the control of the Court of Wards, a lender who knew the facts was *prima facie* "in a position to dominate the will" of the borrower within the meaning of the amended section 16 of the Indian Contract Act. Of course, at the time when their judgments were delivered in this case, the judgment of this Board in *Dhanipal Das's* case had not yet been delivered. Dealing, then, with this case on the lines laid down by this Board, their Lordships have no hesitation in differing from the conclusions arrived at by the learned Judges in the Courts below, and are satisfied that in this case also the borrower was placed in such a condition of helplessness that the lender was "in a position to dominate his will," and that he used that position to obtain an unfair advantage over the appellant.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the decree of the Court of Judicial

1909

MANISHAR BAKHSH SINGH v. SHADI LAL.

Commissioner of Oudh and the decree of the Court of the Subordinate Judge of Bahraich be discharged, and that instead thereof it be ordered that the bond of the 27th January 1896 be set aside and that the appellant pay to the respondents the sum of Rs. 4,000 with simple interest at the rate of 18 per cent. a year from the 14th September 1889 to the date of payment, with proportionate costs in both Courts below on the amount decreed, to be settled by the Judicial Commissioner in case of difference, and that as to the rest each party bear his own costs.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Barrow, Rogers, & Nevill.*

J. V. W.

P. C.
1909
March 24, 25
May 11.

MAHESHAR PARSHAD AND OTHERS (DEFENDANTS) v. MUHAMMAD EWAZ ALI KHAN (PLAINTIFF)

and

MUHAMMAD EWAZ ALI KHAN (DEFENDANT) v. MAHESHAR PARSHAD AND OTHERS (PLAINTIFFS).

Appeal and Cross appeal consolidated.

[On appeal from the Court of the Judicial Commissioners of Oudh, at Lucknow; and from the Board of Revenue of the United Provinces of Agra and Oudh, and the Court of the Commissioner of the Fyzabad Division.]

Oudh Sub-Settlement Act (XXVI of 1866)—Construction of Rules in schedule to Act—Rules 2, 3 and 13—Revision of decree granting under-proprietary rights, made before passing of Act—Jurisdiction of Financial Commissioner—Construction of Lease—Right of taluqdar to ejectment of lessee on expiry of lease—Oudh Rent Act (XXII of 1886).

The history of the Oudh Sub-Settlement Act (XXVI of 1866) together with its provisions and the rules in the schedule attached to it show that the object and purpose with which it was passed were to revise and correct what had been hastily and imperfectly or loosely done, and to secure that no person should enjoy under-proprietary rights who could not establish his claim in the manner prescribed by those rules.

... than in accordance with ... not been supported by the ... 2 and 3, that is proof that ... the lands of which sub-settlement is claimed; that such right has been kept alive over the whole area

* *Present*:—Lord ATKINSON, Lord COLLINS, Lord GORELL and Sir ARTHUR WILSON.

claimed within the period of limitation; and that he has by virtue only of his under-proprietary right held the lands under contract with some degree of continuousness since they came into the taluq.

In 1864 the predecessors in title of the appellants brought a suit for under-proprietary settlement of a village within the respondent's taluq. On 25th March of that year a judgment was given in his favour for a "permanent lease" of the village with payment of a sum for malikana to the taluqdar, which was affirmed by the Settlement Commissioner, the Chief Commissioner, and the Financial Commissioner. After the passing of Act XXVI of 1866 the taluqdar applied for a review of that judgment, and the case was remanded to the Settlement Court for reinvestigation under the new rules, and eventually the Financial Commissioner, on 6th January 1869, decreed as follows.—"The provisions of the Sub-Settlement Act have not been complied with........As the original proprietary title has not been proved the plaintiff is in no way entitled to sub-settlement which actually restores him under our rules to proprietary possession, and makes the taluqdar who has been half a century in possession, the mere recipient of malikana. I decree a farming lease to plaintiff he paying the Government demand plus 25 per cent to the taluqdar for a period of 30 years."

Held that the Financial Commissioner had jurisdiction under section 13 of the rules under Act XXVI of 1866 to make the decree of 6th January 1869, and that it was a valid, and binding decree.

Held also that, on the construction of the decree the lease was one for a term of 30 years from the date of the decree and on the expiration of that period the lessee was liable to ejectment in a suit in the Revenue Court under the Oudh Rent Act (XXII of 1886).

CONSOLIDATED appeals 39 of 1906 from a decree (13th December 1904) of the Court of the Judicial Commissioner of Oudh, which affirmed a decree (10th February 1904) of the Subordinate Judge of Sultanpur; and cross-appeal 7 of 1908 from a decree (13th August 1906) of the Commissioner of Fyzabad, which affirmed a decree (9th May 1906) of the Deputy Commissioner of Sultanpur.

This appeal and cross-appeal relate to a village called Gadaria Dih which was included in the taluq of Muhammad Ewaz Ali Khan, the respondent in the first appeal (39 of 1906) and Taluqdar of Malona, which village had long been, and was at the time of this litigation in the possession of the family of Maheshar Parshad and his co-sharers, the appellants in that appeal, who were referred to in these proceedings as the Shukuls. By the decree from which that appeal is brought it was declared in the Taluqdar's suit that the Shukuls have no under-proprietary right in the village or in any part of it; while in the cross-

1909
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Lachman
Parshad
v.
Muhammad
Ewaz Ali
Khan.

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

appeal (7 of 1908) in which the Taluqdar was the appellant, and Maheshar Parshad and his co-sharers respondents the decree was to the effect that the Shukuls were in possession under a perpetual lease and were not liable to be ejected in the proceedings instituted by the Taluqdar under the Rent Act to obtain possession of the village.

The litigation arose as follows:—In 1864 Bhairon Shukul the ancestor of Maheshar Parshad and his co-sharers instituted proceedings in the Court of the Settlement Assistant Commissioner against Rani Sadha Bibi the predecessor in the title Muhammad Ewaz Ali Khan alleging that he was in possessic and occupation of the village by hereditary right and prayin that a settlement of the under-proprietary right be made wit him; and on 15th March 1864 the Assistant Commissione Mr. W. E. FORBES decided in favour of Bhairon Shukul as follows:—

"After a careful consideration of all the evidence and the facts brought to light hereby, in this case, I have come to the conclusion that plaintiff's claim to permanent lease is a good and just one. I consider, moreover, that the issue

. . . .

25 per cent. on the revised *jama*."

That judgment was affirmed by the Settlement Commissioner, the Chief Commissioner, and Mr. DAVIS the Financial Commissioner.

The Oudh Sub-Settlement Act (XXVI of 1866) was passed in October of that year, and on 17th January 1867 the Taluqdar (Sadha Bibi) applied to the then Financial Commissioner Colonel Barrow for a review of the former Financial Commissioner's judgment and the case was "remanded to the Settlement Court for reinvestigation under the new rules," that is, the rules in the Sub-Settlement Act. On 4th May, the Assistant Settlement Officer held that Bhairon Shukul, had proved, "his under-proprietary right together with the fact that such right has been kept alive over the whole area claimed within the period of limitation." That decision was affirmed by the Commissioner of the Rai Bareli Division on 16th May 1868.

The taluqdar appealed to the Financial Commissioner, Colonel BARROW who, on 21st August 1868, remanded the case for further trial with the remarks that "under the old rules, I may observe that the question of former proprietary right was not laid down strictly as one of the issues requiring positive proof, but under the existing law the claimant has to give legal proof on this point, and it must be placed beyond a doubt that an under-proprietary right does exist."

The issue for trial was, "Is claimant to sub-settlement the old proprietor and had he proprietary possession when the village was incorporated in the taluq, or is he as stated only the Taluqdar's mahajan?"

The case came in that issue for trial before the Deputy Commissioner of Sultanpur who, on 18th December 1868, said:

"My opinion is required on one point only, *i.e.*, whether plaintiff represents the original proprietors who held the village when it was incorporated in the taluqa. This issue, according to the Financial Commissioner's judgment, must be legally proved. Proof is derived from evidence which amounts to conviction. The evidence here is, as usual, documentary and oral. The documentary evidence of the kanungos is for the most part, manifestly untrustworthy. More especially that which is produced by the kanungos who appear for the plaintiff. Their papers were produced as original, ancient documents, but on examination were admitted to be copies only. The verbal evidence of these kanungos being admittedly based on these papers is equally untrustworthy . . . . . I cannot find from the evidence that the Upadhya Brahmans, from whom the Shukul, plaintiff, claims to have inherited, were in proprietary possession, my finding is, therefore, adverse to the plaintiff. At the same time it certainly appears to me that the plaintiff and his forefathers have been in sub-proprietary possession. It has not been shown that money-lending had anything to do with this tenure. Taking Act XXVI as it stands, free from official interpretation, the plaintiff has proved his case and should have a Sub-settlement. But if the Chief Court be of opinion that this cannot be decreed, there is nothing more to be said. The Agent for appellant expresses himself willing to come to terms."

The claim was finally disposed of by the order of Colonel BARROW, the Financial Commissioner, on 6th January 1869 in the following terms:—

"The provisions of the Sub-Settlement Act have not been complied with but as the special appellants' agent is willing to compromise the suit, there need be no further difficulty in disposing of the case. I will only add that as the original proprietor's title has not been proved, the plaintiffs are in no way entitled to sub-settlement which actually restores them under our rules to proprietary possession, and makes the Talukdar who has been half-a century in possession the mere recipient of malikana. I decree a farming lease to plaintiff, he paying the

1900

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

Government demand, plus 25 per cent. to the Taluqdar for a period of 30 years."

One of the questions raised in these appeals was as to the meaning of that order, the Taluqdar contending that the lease was granted for the period of thirty years, while the Shukuls contended that the order gave them a permanent hereditable lease, the rent of which alone was fixed for thirty years.

On 5th April 1869 Bhairon Parshad applied for a review of the above order on the ground that he had only been granted a lease of the village for thirty years whereas he was entitled to a permanent lease, but his application was rejected by the Financial Commissioner on 10th April 1869. On 12th July 1869 Sadha Bibi also applied for a review of the order of 6th January 1869 on the ground that Bhairon Parshad had no right at all, and should not have been granted a lease even for 30 years: that application was also rejected by the Financial Commissioner.

The thirty years provided by the lease to Bhairon Parshad expired on 6th January 1899. The Taluqdar was anxious to recover possession of the village and in October 1894 served a notice of ejectment under the provisions of the Oudh Rent Act (XXII of 1886). Thereupon a suit was instituted on 16th November 1894 in the Court of the Assistant Commissioner of Sultanpur by the Shukuls against the Taluqdar which was decided on 16th March 1895, the Assistant Commissioner holding that tenancy terminated on 6th January 1899 and cancelling the notice as being premature.

In November 1897 a fresh notice of ejectment was issued which was also contested by suit in which the judgment was delivered on 29th January 1898 when the Deputy Commissioner of Sultanpur (Mr. W. F. BROWNRIGG) cancelled the notice on the ground that the lessees acquired a permanent hereditable lease under the order of 6th January 1869. On appeal by the Taluqdar the Court of the Commissioner of Fyzabad on 12th July 1898 refused as a Revenue Court to decide the nature and extent of the Shukuls interest in the village, and cancelled the notice of ejectment as being still premature.

The Taluqdar in November 1898, issued a third notice of ejectment, and in a suit to cancel it the Deputy Commissioner of

Sultanpur on 4th February 1899 made an order granting ejectment on the ground that the lease was for a period of thirty years which had expired on 6th January 1899. This order was, on an appeal to the Commissioner of Fyzabad set aside on 6th May 1899 on the ground that the Shukuls could not be ejected until the Taluqdar had obtained from a Civil Court a declaration of the true construction of the Financial Commissioner's order dated 6th January 1869. On a further appeal by the Taluqdar the Board of Revenue affirmed the judgment of the Commissioner of Fyzabad.

In consequence of these adverse orders the Taluqdar on 11th January 1900, instituted in the Court of the Subordinate Judge of Sultanpur the suit against the Shukuls out of which appeal 39 of 1906 arose. The plaint stated that the defendants had no right to the village after the expiry of thirty years from the date of the Financial Commissioner's decree, and prayed for a decree for possession, and in the alternative for a declaration that the defendants were entitled to no right, either as under-proprietors, or as intermediate holders or to any rights superior to those of mere tenants of the village.

The various pleas raised in defence to the suit appear in the issues which so far as material were as follows:—

(1) Is this suit cognizable by the Civil Court?

(2) Is the present claim for possession and declaration not maintainable?

(3) Is the suit time-barred?

(5) Was the decree of the 6th January 1869, passed without jurisdiction and is it not valid and binding on defendants?

(5) (*a*). Have the defendants proprietary or under-proprietary right in the village in suit?

(6) Does the thirty years' period mentioned in the decree of the 6th January 1869, relate to the term of the lease itself or merely to the amount of the rent fixed thereby to be paid by the defendants to the plaintiff?

(7) If it relates to the terms of the lease itself:—

(*a*) May the defendants legally claim to be entitled to retain possession of the whole or a part of the village in suit now after the expiry of the thirty years' period?

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

(b) May the defendants claim under-proprietary right in all or any of the property specified in paragraph 20th of the written statement, and have they really any such right thereto?

(10) What relief if any is plaintiff entitled to and against which of the defendants?

The Subordinate Judge decided the first issue as a preliminary issue, and holding that the Civil Courts had no jurisdiction made a decree dismissing the suit with costs. On appeal the Court of the Judicial Commissioner reversed that decree and remanded the case to the Subordinate Judge for trial on the merits. In remanding it the Judicial Commissioners observed:

"The Subordinate Judge was right in holding that if the defendants became tenants for a period of thirty years only under the decree of the 6th January 1869, a suit to eject them on the expiration of such period under the terms of the decree must be brought in a Revenue Court, and a Civil Court cannot

. . . .

The Subordinate Judge instead of returning the plaint should have decided whether the relation of landlord and tenant existed between the parties or whether the defendants were under-proprietors. The appeal is decreed with costs, and the Subordinate Judge's order is set aside, and he is ordered to receive the plaint."

The suit then, on 1st December 1903, came on for disposal on the remaining issues, which the Subordinate Judge finally decided on 10th February 1904. He held that the suit was not barred by limitation; that the decree of 6th January 1869 was not passed without jurisdiction, and was valid and binding on the defendants; and that the defendants had no proprietary or under-proprietary rights in the village in suit. He gave no finding on the 6th issue or the first part of the 7th being of opinion, with reference to the judgment of the Judicial Commissioners that the points there raised (as to the construction of the decree of 6th January 1869) should be determined by the Revenue, and not the Civil Courts. On the second part of the 7th issue he held that the defendants could claim the rights therein referred to but had not established them by proof. On the 10th issue he said "As to this issue it is sufficient to say, as has been held by the Judicial Commissioner of Oudh that the Civil Courts cannot eject the defendants, if the defendants were held to be tenants, but the

Civil Courts have every jurisdiction to decide whether the defendants were or were not the under-proprietors, therefore it is clear that the only relief which under the circumstances of the case can be given to the plaintiff, is the declaration of defendants having no under-proprietary right in the village or in any part thereof."

The result was a decree in those terms for the plaintiff, the Taluqdar.

From that decree the Shukuls appealed to the Court of the Judicial Commissioner of Oudh, and the Taluqdar filed objections under section 561 of the Civil Procedure Code to the effect that the Subordinate Judge ought not to have declined to interpret the decree of 6th January 1869 as to whether the period named therein referred to the fixing of the rent or to the duration of the lease, but these objections were subsequently withdrawn.

The Court of the Judicial Commissioner on 13th December 1904 held that the suit was not barred by limitation, and that the Taluqdar had established his right to the declaration sued for. The Judicial Commissioner (MR. ROSS SCOTT) said :

"In order to establish under-proprietary rights in any land it must be proved among other matters that a former proprietor has retained within the period of limitation either by himself or by some other person or persons from whom he has inherited, possession of the land, which by virtue of his proprietary right he held as *sir* or *nankar*, when he was in proprietary possession. As the ancestors of the appellants were never proprietors they can therefore have no under-proprietary rights in any part of the village. We were asked to hold that the finding of the Financial Commissioner was without jurisdiction as it was not shown that the claims of the persons whom the appellants represent had been disposed of by the Settlement Officer otherwise than in accordance with the rules contained in the Oudh Sub-Settlement Act, but we declined to consider the question as the Financial Commissioner was the final Court of appeal at the time, and it was for him to decide whether he had jurisdiction or not. In my opinion it was altogether unnecessary for the respondent to institute the present suit for a declaration that the appellants are not under-proprietors of whole or any part of the village, as the question was finally decided by the decision of a competent Court, which found that their ancestors had never been proprietors of the village. Their ancestor was no doubt recorded at the former Settlement as holding certain plots as *sir* or *khudkasht*, but as they did not hold them by virtue of any former proprietary right, the appellants are not under-proprietors of any of these plots. It has not been contended before us that the respondent or his predecessors have ever admitted that the appellants are under-proprietors."

1909

MAHESHAR PARSHAD *v.* MUHAMMAD EWAZ ALI KHAN.

"For the reasons stated above I would hold that the suit is not barred by limitation and that the appellants are not under-proprietors of the village or any part of it, and would dismiss the appeal with costs.

"I may add that this Court in its judgment remanding the case, appears to have overlooked the main object of the plaintiffs' suit, which was to obtain a declaration that the defendants have no right, under the decree of the 6th January 1869, to remain in possession of the village. It directed the Subordinate Judge to decide 'whether the relation of landlord and tenant existed between the parties or whether the defendants were under-proprietors, and no doubt he has in consequence refused to interpret the decree. The result seems to be that the plaintiff has obtained no declaration, such as the Revenue Courts held that it was necessary for him to obtain, but as the objections of the respondents have been withdrawn, it is impossible for us to decide whether the defendants have a right to remain in possession after the expiry of the thirty years or not."

The Additional Judicial Commissioner (Mr. W. F. WELLS) delivered a judgment in which he agreed with the Judicial Commissioner, and at the end of the judgment he said of the Shukuls:

"They have, therefore, no under-proprietary rights of any kind left. The way is now clear for the Revenue Courts to determine whether the lease decreed by the Financial Commissioner was only a lease for thirty years, which has expired, rendering the appellants liable to ejectment by notice, or whether the lease was one in perpetuity, the rent of which might be revised for after thirty years."

The appeal was accordingly dismissed, and the decision of the Subordinate Judge affirmed.

Thereupon the *Taluqdar* issued a fresh notice of ejectment under the Rent Act (XXII of 1886) to contest which under section 108 (8) of the Rent Act the Shukuls, on 12th December 1905, instituted the suit out of which the cross-appeal (7 of 1908) arose. They claimed that in any case they were entitled to the *sir* lands (the subject of issue 7 (*b*)) and that in no case could they be ejected without compensation for improvements (paragraph 7 (*f*) of the plaint).

The Deputy Commissioner of Sultanpur (MR. D. L. JOHNSTON) in giving judgment on 9th May 1906 said:

"The plaintiffs' contention is that the Financial Commissioner gave a farming lease in perpetuity subject to revision of terms at settlement. The defendant's contention is that the lease was for thirty years only and now that it has expired, the plaintiffs are ordinary tenants and can be ejected by notice. In one of his previous attempts to eject by notice the taluqdar counted the thirty years from the commencement of the term of Settlement (1864 A. D.). Later as the courts refused to count from earlier than 1869, he accepted their view, but his original attitude confirms the view of Mr. Brownrigg set forth in his judgment, dated 29th January 1898, (plaintiffs' No. 47) that the Financial Commissioner refused

1909

MAHASHAH PARSHAD
v.
MUHAMMAD EWAZ ALI KHAN.

under-proprietary rights which were almost as valuable as proprietorship, but gave a perpetual farming lease, adding the term of thirty years to allow of alteration of the rent at the revision of Settlement and that the term ran from the commencement of Settlement. Following Mr. Brownrigg I am of opinion that the plaintiffs hold under a perpetual farming lease, the terms of which are liable to alteration at the Revision of Settlement but were not altered at the last Revision."

In the result the notice of ejectment was cancelled with costs.

The Taluqdar appealed to the Commissioner of the Fyzabad Division (MR. R. E. HAMBLIN) who said in his judgment on 13th August 1906:

"The question argued is whether the farming lease given by Colonel Barrow in 1869 is only for thirty years or is perpetual. Stress is laid on the application by plaintiff for review on the ground that he ought to be given a perpetual lease, and on Colonel Barrow's order on this rejecting it. Considering what has been seen in this lengthy litigation of Colonel Barrow's procedure, I am unable to agree that his order 'rejected' necessarily means that he accepted plaintiff's view that the lease was one for thirty years. The application was also one for further inquiry and all the value that I am willing to give the word 'rejected' is that Colonel Barrow considered that he had finally settled the question. I agree with what Mr. Brownrigg has said in his judgment of the 29th January 1898 (and in his supplementary note) as to the value of the lease. In my opinion Colonel Barrow considered the question before him was whether plaintiff should be given a sub-settlement, or not, and as he decided this adversely to plaintiff, and as he believed the defendant was willing to come to terms he fixed himself the terms he considered suitable. He gave a perpetual lease fixed as to the rent for thirty years, which he probably meant to mean the term of settlement. The Settlement Department has so considered it for whilst holding that the rent should be changed at last settlement and changing it, yet that department and the Revenue Courts have held the opinion that the period of thirty years in the lease began from the year 1869 in which Colonel Barrow gave his order."

The appeal was consequently dismissed and the order of the Deputy Commissioner affirmed. An appeal to the Board of Revenue was also on 2nd January 1907 dismissed on the grounds that the decision appealed from was final.

From the decision of the Court of the Judicial Commissioner of 13th December 1904 the Shukuls appealed to His Majesty in Council in the ordinary course (appeal 39 of 1906); and by an order in Council made on 2nd November 1907 special leave to appeal was granted to the Taluqdar to appeal from the order of the Commissioner of Fyzabad of 13th August 1906, and the order of the Board of Revenue rejecting the appeal therefrom.

1903

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

Kenworthy Brown for the appellants in the appeal and respondents in the cross-appeal contended, as to the suit brought by the Taluqdar that it was barred by limitation, and reference was made to *Imdad Husain* v. *Aziz-un-nisa* (1) per Lord Hobhouse; *Widow of Shankur Sahai* v. *Rajah Kashee Pershad* (2); *Drig Bijai Singh* v. *Gopal Datt Pandey* (3); Oudh Revenue Courts (Act XVI of 1865), sections 2 and 5; Act XIII of 1866 section 1 and, as to the effect of confiscation on under-proprietary rights, *Thakurani Sookraj Koowar* v. *Government* (4).

It was also contended that the decree of 6th January 1869 was passed without jurisdiction because rule 13 under the Oudh Sub-settlement Act (XXVI of 1866) did not authorise the Financial Commissioner to revise the decision of the Settlement Officer of 15th March 1864 which had declared the predecessor in title of the appellants to be under-proprietors of the village in suit and had given them a permanent lease of it, and his decision had been affirmed by the Settlement Commissioner, and the Chief Commissioner. Even if the status of their predecessor in title was liable to be altered by inquiry and revision under the rules in Act XXVI of 1866, he would not, merely because he was unable to give the precise proof required by rules 2 and 3 under that Act, necessarily be left in a position which rendered him subject to eviction. On the construction of the decree of 6th January 1869 it was submitted that the expression "for thirty years," did not refer to the duration of the lease, which was meant to be permanent, but referred only to the rent which was intended to remain unaltered for that period. There was nothing in the decree as to ejectment after the expiry of the thirty years. The decree of the Settlement Officers of 15th March 1864 decided that the predecessor in title of the appellants was entitled to a "permanent lease" on the ground that he had been holding for a long term of years in virtue of former proprietary right," which showed what his status was considered to be on the evidence then produced. The decree of the Financial Commissioner did not deprive Bhairon Shukul of any rights he then had. If it only granted him a lease of the land for thirty years, then,

(1) (1895) I. L. R., 23 Calc., 483 (492): L. R., 23 I. A. 8 (16).
(2) (1873) L. R. I. A. Sup, Vol. 235.
(3) (1879) I. L. R., 6 Calc., 218 (224, 225). L. R., 7 I. A. (21, 22).
(4) (1871) 14 Moore's I. A. 112 (121).

at the expiry of that period, the appellants as his successors in title were still entitled to the same rights as Bhairon Shukul had before the lease was granted. The Judicial Commissioners were wrong, therefore, in holding that the decree of the Financial Commissioner amounted to a declaration that the predecessor in title of the appellants had no under-proprietary right and that consequently the appellants had none. The proper construction of that decree was that put upon it by the Deputy Commissioner of Sultanpur, and the Commissioner of the Fyzabad Division held that it granted a perpetual lease to Bhairon Shukul, and that decision, it was submitted, was correct, and the respondents in the cross-appeal could not be ejected. Reference was made to the former Oudh Rent Act (XIX of 1868); the Oudh Rent Act (XXII of 1886) section 3, clause 10, as to the meaning of "under-proprietary right," and sections, 52, 53, 55 and 108 as to the ejectment of tenants; and Syke's Compendium of the law of Oudh, pages 136, 148.

De Gruyther K. C. and *B. Dube* for the respondent in the appeal, and the appellants in the cross-appeal, contended that in the true construction of the decree of 6th January 1869 a farming lease was granted to Bhairon Shukul for thirty years, and that period having expired in 1899, his successors in title were liable to ejectment. The temporary settlement of all revenue paying land in Oudh was made for a term of thirty years, and that was the reason for its being put into the lease. The Financial Commissioner had ample jurisdiction to revise the decisions as to the claim of the ancestor of the Shukuls to under-proprietary rights in the village, which were given before the passing of Act XXVI of 1866, under rule 13 in that Act; and it was for Bhairon Shukul to prove under rules 2 and 3 that he or his predecessors had previously possessed under-proprietary rights in the village. In his remarks on 21st August 1868 Colonel Barrow, the Financial Commissioner observed, "Under the existing law the claimant has to give legal proof on this point, and it must be placed beyond doubt that an under-proprietary right does exist." Reference to the subsequent proceedings before the Deputy Commissioner on the 18th December 1868 showed that no such right was proved. Consequently the Financial Commissioner

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

in giving his decision on 6th January 1869, said, "As the original proprietor's title has not been proved, the plaintiffs are in no way entitled to sub-settlement which actually restores them under our rules to proprietary possession, and makes the taluqdar who has been half a century in possession the mere recipient of malikana." It was unreasonable, therefore, to suppose that the decree granted the ancestor of the Shukuls a perpetual lease. The rejection of the application for a review also showed that the lease was not intended to be a permanent one. It was pointed out, by reference to the various stages of the litigation that the construction placed on the decree by the lower courts in the Shukul's suit which formed the subject of the cross-appeal, was opposed to the findings on which that decree was based, to the surrounding circumstances, and to the conduct of Bhairon Shukul the ancestor of the *respondents in* that appeal; and that the Lower Courts by *holding these respon*dents to be perpetual lessees had given *them practically the same* right which was refused to them by the *Financial* Commissioner in 1869. Reference was made to the *history of the legislation* in Oudh after the proclamation *of confiscation as showing that* the intention was that the *inevitable imperfections in the* proceedings for the settlement and sub-settlement of the Province should be subsequently revised and corrected. Sykes Compendium of the law of Oudh, page 14, paragraphs 14, 28, 29, 65, and pages 130, 135, 142, 143, 144, 145, 278, 285, 289, 291; Oudh Revenue Courts' Act (XVI of 1865), section 2; Oudh Sub-Settlement Act (XXVI of 1866), rules 2, 3 and 13; Oudh Rent Act (XIX of 1868), sections 3 and 5; and Oudh Rent Act (XXII of 1886), section 108, sub-section 4 were referred to and the cases cited for the appellants were distinguished.

The term of the lease having now expired, the respondents in the cross-appeal were no longer holding the village under the decree of 6th January 1869, but only on sufferance or as tenants holding over, and as such were liable to ejectment by notice under section 53 of the Rent Act.

Kenworthy Brown replied referring to the Oudh Land Revenue Act, 1901. The judgments of the Revenue Courts were

1909

MAHESHAR PARSHAD
v.
MUHAMMAD EWAZ ALI KHAN.

"permanent lease" are used in this decree, it cannot have been meant that the relation of landlord and tenant was to be created between the parties. The rights the plaintiff claimed were "under-proprietary rights." The decree commences thus:—

"After a careful consideration of all the evidence and the facts brought to light thereby in this case, I have come to the conclusion that the plaintiff's claim to a *permanent lease* is a good and just one,"

so that it is evident that the Assistant Settlement Officer regarded a "permanent lease" and "under-propertary rights," when applied to the tenure of such lands as these, as convertible terms.

The Oudh Sub-Settlement Act received the assent of the Governor-General on the 12th October 1866. Very soon after Rani Sadha Bibi presented under this Act a petition to L. Barrow, the new Financial Commissioner, for a review of the late Financial Commissioner's judgment.

On the 17th January 1867, judgment was delivered and the case was ordered to be remanded to the Settlement Court for re-investigation under the new rules on the ground that it did not appear from the judgments of the Lower Courts that the respondent's possession was "sufficiently continuous to entitle him to Sub-Settlement," and that it was doubtful whether he even then could get Sub-Settlement, or *sir*, equal to the profits of his lease. Other proceedings were taken and ultimately, on the 6th January 1869, the same Financial Commissioner pronounced a decree in the following terms:—

"It appears that the mauza in suit was included in Taluqa Mahona in 1228 Fasli, having previously been incorporated in Taluqa Deokali in or about 1192 Fasli, but the Upadhias from whom the plaintiff claims were not in proprietary possession on either of these occasions. The Settlement Officer, however, supposes that plaintiff and his forefathers have been in sub-proprietary possession, and that plaintiff is entitled to a decree for Sub-Settlement, and further, appellant's Agent expressed his willingness to come to terms.

"The provisions of the Sub-Settlement Act have not been complied with, but as the special appellant's Agent is willing to compromise the suit, there need be no further difficulty in disposing of the case. I will only add that as the original propr etary title has not been proved, the plaintiffs are in no way entitled to Sub-Settlement, which actually restores them under our rules to proprietary possession, and makes the Taluqdar, who has been half a century in possession the mere recipient of *malikana*. I decree a farming lease to plaintiff, he paying the Government demand plus 25 per cent. to the Taluqdar for a period of thirty years."

1909

MAHARAJA PARTAB v. MUHAMMAD FAIZ ALI KHAN.

It is contended that this decree was made without jurisdiction, and is therefore a nullity, with the result that the earlier decree of the 15th March 1861 stands, and the Shukuls are therefore entitled to remain in possession of the village by virtue of the under-proprietary rights which that decree gave them.

The answer to this question depends on the construction of the 13th of the above-mentioned Rules. It runs thus:—

> "13.—Cases in which claims to under-proprietary rights have been disposed of otherwise than in accordance with these rules will be open to revision, but this rule will not apply to cases disposed of by arbitration or by agreement of the parties."

Rule 2 prescribes what a claimant must prove in order to obtain a sub settlement (which is nothing more than an authoritative ascertainment and declaration of his under-proprietary rights), and enacts, amongst other things, as follows:—

> "He must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation. He must also show that he, either by himself or by some other person or persons from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege granted on account of service, or by favour of the Taluqdar, held such lands under contract (*pucka*) with some degree of continuousness since the village came into the Taluqa."

Rule 3 prescribes how the words "some degree of continuousness" are to be interpreted. Claims which have been therefore disposed of "otherwise than in accordance with these Rules" within the meaning of Rule 13, must, therefore, refer to those claims which have not been supported by the proofs prescribed by Rules 2 and 3, amongst others, for the establishment of future claims. Rule 13 would therefore be meaningless, unless it authorized an inquiry into those matters. The argument, however, is that even if, upon this inquiry, it should be ascertained that the claimant had not proved, and could not prove, any of the matters prescribed by Rules 2 and 3, the Chief or Deputy Commissioner should simply abstain from making an order or decree for sub-settlement, and should leave the claimant in the secure possession under the old decree of the under-proprietary rights to which it had been ascertained he was entitled according to the new standard. In their Lordships' opinion, this contention cannot be sustained. Sub-settlement was not a new thing

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

giving some extra right or privilege over and above what was secured by a decree finding that a person was possessed of under-proprietary right. And the history of the Act together with its provisions, and the rules attached to it, show that the object and purpose with which it was passed were to revise and correct what had been hastily and imperfectly, or loosely done, and to secure that no person should enjoy under-proprietary rights who could not establish his claim in the manner prescribed by those rules. Revision would be a perfunctory and useless operation on any other terms.

Their Lordships therefore think that the Financial Commissioner had jurisdiction to make the decree of the 6th January 1869, and that it is a valid and binding decree.

The next question is, What is its meaning? It is urged that it, in effect, grants the plaintiff a perpetual lease, that the period of thirty years mentioned in it is the period which is to elapse before revision, and that the Taluqdar is practically left in the same position as he was in under the earlier decree, save only that he has not the right to alienate; though why he should not have that right is not shown. But the whole frame of the decree shows that it never could have been intended to put the plaintiff in such a position. He was not a Taluqudar, nor an occupier, and was found not to be a person possessed of under-proprietary rights. The decree does not put him into possession of the land, but merely entitles him to farm the rents of the occupiers. The whole thing was a compromise, and more or less of an anomaly, and though the Financial Commissioner gave him a valuable right, he could not, in the face of his own declaratoin that the provisions of the Sub-Settlement Act had not been complied with, and that the plaintiff was "in no way entitled to Sub-Settlement" which would restore him, under the Rules, to proprietary possession, and make the Taluqdar "a mere recipient of a *malikana*," have intended to put him into a position almost as beneficial as if he had had all the qualifications he is stated to have lacked. Their Lordships are therefore of opinion that the lease decreed was only a lease for a term of thirty years from the date of the decree. That being so, the Taluqdar would be entitled to recover possession if he took the right steps and proceeded

in the right tribunal. He served a notice of ejectment under the provisions of section 52 (2) of the Oudh Rent Act, 1886. That appears to be the right course, having regard to the provisions of the 54th section. No objection has been taken in the arguments to the form of the notice or to the service of it. Section 108 of the Act prohibits all Courts other than Courts of Revenue from entertaining suits by a landlord for the ejectment of a tenant. According to the construction their Lordships have put on the decree of the 6th January 1869, the Shukuls are now in the position of tenants whose tenancy has expired.

The Taluqdar is, therefore, entitled to a declaration, such as is asked for in the suit instituted by him on the 11th January 1900, in the Court of the Subordinate Judge of Sultanpur,—namely, that the Shukuls are not entitled to the rights of under-proprietors, or to any rights other than those of tenants for a term of thirty years whose term has expired,—but not to any further relief. The decree, dated the 13th December 1904, of the Court of the Judicial Commissioner of Oudh, is in their Lordships' opinion right, and should be affirmed.

The Shukuls, however, instituted a suit in the Court of the Deputy Commissioner of Sultanpur, under section 108 (8) of the Oudh Rent Act, 1886, in which they prayed that the abovementioned notice of ejectment might be cancelled. The Deputy Commissioner, on the 9th May 1906, made a decree cancelling it, and holding that the Shukuls were entitled to a perpetual farming lease. Against this decree the Taluqdar appealed to the Court of the Commissioner of Fyzabad. On the 13th August 1906, that Court made an order dismissing the appeal. Against this order the Taluqdar appealed to the Board of Revenue for the United Provinces of Agra and Oudh; but by an order of that Board, dated the 2nd January, 1907, his appeal was dismissed. Against this order and the decree of the Commissioner of Fyzabad the Taluqdar has, by special leave, appealed to His Majesty in Council, and his appeal has been consolidated with the first-named appeal. Their Lordships are of opinion that the orders appealed against by the Taluqdar were wrong, and should be reversed.

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

Their Lordships will therefore humbly advise His Majesty that the first-named appeal should be dismissed; that the taluqdars appeal should be allowed; that the orders or decrees of the Board of Revenue for the United Provinces of Agra and Oudh, the Court of the Commissioner of Fyzabad, and the Court of the Deputy Commissioner of Sultanpur, dated respectively the 2nd January 1907, the 13th August 1906, and the 9th May 1906, should be reversed; and that the action instituted in the last-mentioned Court should be dismissed, with costs throughout, but without prejudice to the claims made by the Shukuls in paragraph 7 (*f*) of their plaint in the said action under section 57 of the Oudh Rent Act 1886.

The appellants in the first-named appeal must pay the costs of that appeal, and the respondents to the Taluqdar's appeal must pay his costs of that appeal.

Appeal allowed.
Cross appeal dismissed.

Solicitors for the appellants in the appeal, and respondents in the cross appeal:—*T. L. Wilson & Co.*

Solicitors for the respondent in the appeal and appellant in the cross appeal:—*Barrow, Rogers & Nevill.*

J. V. W.

P.C.
1909
March 23, 24.
May 13.

PARBATI (DEFENDANT) v. NAUNIHAL SINGH (PLAINTIFF).
[On appeal from the High Court of Judicature for the North-Western

petition to Collector—Entry of names in village papers in accordance with

the other

held and

enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector dated 13th June 1861 to have their names entered to that effect in the official papers of the village. This was done, the petition was filed in the Collectorate, and entries were made in the village papers in accordance with it up to 1899.

Held by the Judicial Committee (reversing the decision of the High Court) that on the evidence in, and circumstances of the case, a partition of the property

Present:—Lord ATKINSON, Lord COLLINS, Lord GORELL, and Sir ARTHUR WILSON.

had been effected in 1861, and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time.

The principles laid down in Apporier v. Rama Subba Aiyan (1), and *Balkishan Das* v. *Ram Narain Sahu* (2) followed.

The High Court had proceeded in an erroneous method in considering whether each document was by itself sufficient to rebut the *prima facie* presumption that as the family was joint before 1861 it continued to be joint, and omitting to take into account the cumulative effect of all the documents, which taken together showed that all the transactions of the 38 years from 1861 to 1899 could only be reconciled and made consistent on one hypothesis, namely, that the petition of 1861 was a genuine document, and the agreement it embodied a real agreement.

APPEAL from a judgment and decree (27th May 1904) of the High Court at Allahabad, which reversed a decree (29th November 1901) of the Court of the Subordinate Judge of Aligarh.

The main question for decision on this appeal was whether the respondent (plaintiff) and his uncle, one Dalip Singh, were, or were not, members of a joint Hindu family at the death of Dalip Singh in February 1899. A pedigree showing how the parties to the litigation were related, is set out in their Lordships' judgment, and showed that Tara Singh died in 1858 leaving him surviving two sons Nirmal Singh and Dalip Singh, and a widow Musammat Phul Kunwar. Nirmal Singh died leaving an infant son, the plaintiff, and a widow Musammat Rani. After the death of Nirmal Singh in 1861 a dispute arose in the family about the estate left by Tara Singh, the settlement of which was recorded to the following effect in an application to the Revenue Court dated 13th June 1861, as to the manner in which the property would be held, the applicants who were described as "petitioners" being (1) Dalip Singh; (2) Musammat Rani, for herself and as guardian of her minor son Naunihal Singh; and (3) Musammat Phul Kunwar.

"*After the death of Nirmal Singh, there arose some dispute between us, the* applicants, in connection with the estate of Chaudhri Tara Singh, the ancestor of us, the executants, which has with mutual consent been settled in this way:—

"The whole of the ancestral property and property newly purchased with the exception of patti Shadi Ramwala in kasba Shikarpur and the remaining estate—in equal shares (*that is*) *half and half. Dalip Singh to enjoy profits* and bear loss to the extent of one-half, and Musammat Rani, widow, and

(1) (1866) 11 Moore's I. A., 75.

(2) (1903) I. L. R., 30 Calc., 738; L. R. 30 I. A., 139.

1909

PARBATI
v.
NAUNIHAL
SINGH.

Naunihal Singh, son, of Nirmal Singh, deceased, to the same extent. Dalip Singh to be the lambardar in mauza Bhansrauli, Azampur and Alipura, and Musammat Rani under the sarbarahkarship of Dalip Singh in mauza Khandwaya, Bhatola, Nurpur Nagaha and patti Ismail, situate in Shikarpur. Musammat Phul Kunwar to be the lambardar in patti Shadi Ramwala in Shikarpur and to enjoy profits and bear loss. In the entire estate, that is, the revenue-paying (property) and resumed and revenue-free milak lands, habitation land, houses, shops, etc., and all that was in the possession and enjoyment of Chaudhri Tara Singh, ancestor, Dalip Singh to have one-half and Musammat Rani, widow, and Nihal Singh, son, of Nirmal Singh, the other half. After the death of Musammat Phul Kunwar, the aforesaid persons will enjoy profits and bear loss according to the shares given above."

The application was made, it was stated, by Musammat Rani through her brother Shib Charan, and by Musammat Phul Kunwar through her son Dalip Singh; and prayed that the applicants' names might, according to the contents of the application, be entered in the official papers. The contents of this application were verified by an official of the Revenue Court who reported that Musammat Phul Kunwar and Musammat Rani stated that the dispute between them had been settled, and that the applicants had filed the application after the settlement of the matter. On 4th July 1861 an order was passed giving effect to it, and thereafter the Revenue Records were framed in accordance with the agreement.

Subsequently Musammat Rani, taking her infant son with her left Shikarpur, the home of her husband for Jehangirabad the home of her own parents. Dalip Singh acted as her Sarbarahkar until 1866 but she then appointed her brother Shib Charan as sarbarahkar in place of Dalip Singh. On 6th June 1866, she also executed a power of attorney in favour of Shib Charan and one Lalji Mal making them her general attorneys and representatives in which capacity they acted for her for several years in the management of her property, and in particular gave receipts for various sums which were paid to her by Dalip Singh on account of the profits of her divided share.

Dalip Singh died in February 1899 without male issue and the name of his widow Musammat Parbati, the appellant, was entered in the Revenue records as the heir and representative of the deceased husband, the Revenue Courts holding after inquiry that the property of which he died possessed was separate property.

On 28th September 1900 Naunihal Singh brought the present suit in which he claimed a declaration that up to the date of the death of Dalip Singh on 1st February 1899 the plaintiff and Dalip Singh were joint and that the plaintiff succeeded him by right of survivorship; also that he, as successor of Dalip Singh, was entitled as against the defendant, the widow of Dalip Singh to realize outstanding debts: He further prayed for possession of the property in suit.

In defence, Musammat Parbati, pleaded that her husband Dalip Singh and the plaintiff lived separately, were separate in food, and were in fact not joint in any way. She further alleged that Dalip's entire property was separate; that he carried on all his business separately, and that he had acquired a good deal of property with his personal funds and by his own exertions after his separation from the family in 1861; that he and the plaintiff had their respective shares partitioned by the Revenue Court, and that the plaintiff and his mother as his guardian and agent had been in separate possession and enjoyment of their separate share and had all along realized the profits of their share from Dalip Singh.

The only issue dealt with by the lower courts was, whether the plaintiff and before him his predecessor in title were separate from Dalip Singh.

The principal documentary evidence for the defendant was (1) the application, dated 13th June 1861, and the papers relating to the partition proceedings taken by the plaintiff, and Dalip Singh as mentioned in the statement of the defence; (2) village papers; (3) sale deeds by which the vendors conveyed the property purchased to Dalip Singh without any mention of the plaintiff or his mother; (4) decrees for money which showed that Dalip Singh had separate dealings; (5) receipts showing the payment of separate taxes and licenses to carry on business; (6) the receipts referred to in the statement of the facts showing that Musammat Rani received the profits of her divided share from Dalip Singh.

The plaintiff's documents included a number which were put in to show that the plaintiff, and Dalip Singh instituted and defended certain suits jointly and described themselves as the joint owners of the property in suit.

1909

PARBATI
v.
NAUNIHAL
SINGH.

The Subordinate Judge decided that the plaintiff had not been joint with Dalip Singh. He summed up his reasons as follows:—

"The conclusion to which I come is that until Nirmal's death the family had been joint, after his death, the property was divided by an arrangement between Dalip Singh and Rani; the arrangement was accepted by the plaintiff; he has since he attained majority held and possessed the property which by the arrangement had been allotted to him; he applied for partition by the revenue authority, he got his share separated; he has dealt and transacted business on his own account; he did not during Dalip Singh's lifetime ever raise any objection to Dalip Singh having business in his single name; he received profits from him; he managed his own share; he could have objected to the partition, he could have applied that it should be refused and have insisted that the family was joint, he did not insist on it, he joined himself in the prayer for partition. Dalip Singh's estate is much more valuable than what is owned and possessed by the plaintiff. It should have been, he says, equal had there been a partition. But Dalip Singh increased it after the partition. He traded in corn, he had lending business. The plaintiff who resided at Jehangirabad sold his grain. He had a little lending business.

"I hold on the first issue that plaintiff was not joint with Dalip Singh. He is not therefore entitled to succeed him."

Consequently the Subordinate Judge made a decree dismissing the suit with costs.

An appeal to the High Court was heard by SIR JOHN STANLEY, C.J., and BURKITT, J., who reversed the decision of the Subordinate Judge, and (except in regard to a small portion of the property in suit) they decreed the plaintiff's claim.

The High Court considered that the evidence on which the defendant relied was insufficient to prove the separation contended for between the plaintiff and Dalip Singh. With regard to the receipts which were put in by the defendant, with other documents, to prove that Musammat Rani receives the profits of her divided share from Dalip Singh, they held that they could not be taken into consideration against the plaintiff on the ground that they were not signed by Musammat Rani herself; and that Shib Charan (her own brother and sarbarahkar) and Dalip Singh who signed the receipts on her behalf had no power to do so under the power of attorney executed by her in their favour. After considering the petition of the 13th June 1861, the High Court said:—

"It is contended that this petition had the effect of working a separation in the family between Dalip Singh and the plaintiff who it is alleged were

henceforth separate owners each of half of the estate. We find ourselves unable to concur with the learned advocate for the defendant who earnestly pressed this contention on us. We notice that no such effect was claimed for this petition in the lower court. It is not even mentioned in her written statement by the defendant. The petition in our opinion amounts to no more than a compromise between the two widows, an arrangement for the management of the estate for the time being and for the purpose of supplying the revenue authorities with the names of persons to be appointed lambardars of the several villages comprised in it, and the nominal apportionment of shares between the plaintiff and Dalip can be considered to be no more than an expression of the ladies' opinion that *that* was the measure of their interest in the family estate. . . . . . .

"Before leaving the subject of the petition of June 13th, 1861, we would remark that *it is the only evidence produced by the defendant with the object of showing an intention to separate among the members of the family.* At the most it is but a petition presented to revenue authorities intimating the wishes of the family as to the entry of names consequent on Nirmal's death and as to the appointment of lambardars. It does not profess to be signed by Musammat Rani *but was written and filed by her brother Sheo Charan apparently without any* authority in writing from his sister. It is from this petition coupled with the subsequent conduct of the parties and other evidence that we are asked to infer separation from 1861. As showing the subsequent conduct of the parties the learned advocate for the defendant laid great stress on certain partition proceedings which took place after 1861."

After discussing in detail the four cases of partition the High Court said:—

"Are we then bound to infer that these four cases are strong evidence of a severance or separation of interests between plaintiff and Dalip from 1861 onwards and indicate an intention on their part that the rest of the family property (the great bulk of it) should between them be the subject of ownership in certain defined shares. We think not. We cannot draw such a far reaching inference from these few and isolated instances. They in our opinion show no more than that in these three cases (in one case from local reasons and in two cases from reasons personal to Dalip) it was thought advisable to separate from the *other* co-sharers, and Dalip may have thought that unless there was a partition between him and his nephew also he could not get a partition as against other co-sharers. It will be noticed that in all these cases there were many co-sharers interested who did not belong to plaintiff's and Dalip's family. Not one instance has been adduced of a partition of a mahal in which plaintiff and Dalip were the sole co-owners. But though some portion of a joint family estate may have been divided or partitioned between the members of the family, it does not follow that thereby a severance of interests is effected in the remainder of the estate. This is laid down by their Lordships of the Privy Council in the case of *Rewun Pershad* v. *Radha Beely* (1), where *inter alia* their Lordships hold it to be undisputed "that a division may be either total or partial." Also in their judgment in *the Shiva Ganga case* (2) their Lordships in a passage cited from MacNaghten's Hindu

(1) (1846) 4 Moore's I. A., 137 at page 168. (2) (1863) 9 Moore's I. A., 539 at page 610.

1909

PARBATI
v.
NAUNIHAL
SINGH.

Law contemplate the possibility of an estate being partially joint and partially divided, when they say 'that where a *residue is left undivided* upon partition what is divided goes as separate property, what is undivided follows the *family* property . . . . In other words the law of succession *follows* 'the nature of the property and of the interest in it.' "

And they concluded their judgment as follows:—

"Finally, for the reasons we have above set forth at length, we are of *opinion* that there was no separation in this family before the death of Nirmal. We find that the *arrangement* of June 13th, 1861, did not have the effect of working a separation between plaintiff and his uncle, and was *merely* a compromise between plaintiff's mother and grandmother. We find that the partitions affected only a small portion of the family estate, the great bulk of which remained joint and undivided. The evidence of the witnesses called for the plaintiff is in our opinion truthful, while the past evidence produced for the defendant is we think mostly useless, untrustworthy, and not to be compared with that called for the plaintiff. We are of opinion that the [illegible] overwhelmingly proves that plaintiff and his uncle lived as members of a joint Hindu family which consisted, after the death of Har Narayan, of Dalip and the plaintiff, that no separation of interest or of *title* as far as the great bulk of the family property is concerned, took place between the uncle and nephew; that they were joint at the death of Dalip in February 1899, and that thereupon the plaintiff succeeded by right of survivorship to possessing his uncle's interest in the joint family property."

The High Court therefore allowed the appeal and made a decree in favour of the plaintiff.

On this appeal, which was heard *ex parte*

DeGruyther, K. C. and *Ross* for the appellant contended that the evidence on the record was sufficient to prove separation between the plaintiff and Dalip Singh in 1861, and that up to the death of the latter they had lived and enjoyed their respective shares of this property in severalty. The High Court in coming to an opposite conclusion had not acted in accordance with the principles laid down in *Appovier* v. *Rama Subba Aiyan* (1), and *Balkishen Das* v. *Ram Narain Sahu* (2). In the present case the members of the family had agreed in 1861, to become separate in title, and had put their intention into the form of the petition of 13th June 1861, stating that from that time they intended that the property (which they specified), should be the subject of ownership in certain defined shares; and thenceforth it

(1) (1866) 11 Moore's I. A. 75.
(2) (1903) I. L. R. 30 Calc. 738: L. R. 30 I. A. 139.

had been so held: this, without any actual physical division was sufficient on the principles abovementioned to effect separation. The High Court had put a wrong construction on that petition and the subsequent proceedings of the parties which confirmed its meaning and intention. That court also erred in rejecting the papers put in by the defendant to prove payments of the plaintiff's divided share of the profits; those payments, it was contended, showed that the profits of the properties divided in accordance with the petition of 13th June 1861, were separately enjoyed by the persons to whom they were allotted; and a separation of interests between Dalip Singh and the plaintiff was also indicated by the proceedings taken by them in the Revenue Courts on four separate occasions for a complete partition of portions of the property which was divided in 1861; in which proceedings the plaintiff concurred; as he had on attaining majority accepted and ratified the partition effected in that year. Reference was made to Mayne's Hindu Law, 7th Ed., pages 665, 667, 669 and 671, paragraphs 492, 493 and 495, *Kandasami* v. *Doraisami Ayyar* (1); *Rewun Pershad* v. *Radha Beeby* (2); and Macnaghten's Principles and Precedents of Hindu Law, Ed. 1829, Volume I, Chapter IV, on "Partition" pages 53 and 54, the two last reference being to passages from which it was contended the High Court had drawn a wrong inference in their judgment under appeal which it was submitted on the above grounds should be set aside.

1909, *May* 13th.—The judgment of their Lordships was delivered by LORD ATKINSON:—

In this case the respondent, Chaudhri Naunihal Singh, the only son of Chaudhri Nirmal Singh, deceased, on the 28th September 1900, instituted in the Court of the Subordinate Judge of Aligarh, a suit in the nature of an ejectment against the appellant, Musammat Parbati, widow of his paternal uncle, Chaudhri Dalip Singh, deceased, to recover possession of the lands fully described in the schedule attached to his plaint, and for other relief.

He based his right to the relief he sought on two alleged facts, (1) that his late father and his late uncle, Dalip Singh,

(1) I. L. R., 2 Mad., 317. (2) (1846) 4 Moore's I. A., 137.

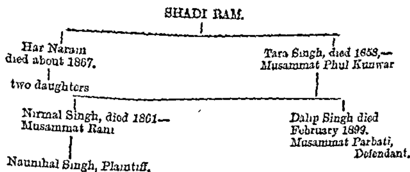
1909

PARBATI
v.
NAUNIHAL
SINGH.

were the two male members of a joint Hindu family of which he (the plaintiff) was the surviving male, and (2) that the property which was sought to be recovered belonged to that family jointly.

The defendant resisted this claim on the ground, among others, that all the joint family property had, by agreement between the then existing members of the family, been partitioned in interest in the year 1861, though not then, and only to a small extent afterwards, partitioned by metes and bounds, and that the land sought to be recovered was the separate property of her husband, Dalip Singh, who died the owner in possession thereof on the 1st February 1899.

The following pedigree shows the relationship of the several parties to the suit:—



The two daughters of Har Narain have not been made parties to the action, and do not apparently claim any interest in this property, and the precise nature of Har Narain's right to or interest in it (if any) does not appear. The Subordinate Judge decided in favour of the defendant and dismissed the action, holding that there had been a partition of the family property in 1861, and that the plaintiff was not joint owner with Dalip Singh at the time of the latter's death, and, consequently, was not entitled to succeed him. The High Court at Allahabad by their decree of the 27th May 1904, set aside this decree "with the exception of Mahal Dalip Nagar partitioned in 1870, and the Mahals partitioned to Dalip in 1890 and 1893 in Shamilat, Shikarpur, and in Khandwaya, to which the defendant is entitled for a widow's estate," and declared that, as to all the rest of the property claimed, ... the family was a joint Hindu family during the lifetime of Dalip Singh, that since his

death the plaintiff has been the owner and in possession of the aforesaid property as survivor, and that the defendant has no right to it." Against this decree the defendant has lodged the present appeal.

The several partitions mentioned in the decree of the High Court were partitions by metes and bounds of the joint property, carried out under orders of competent tribunals.

Though the question for decision by their Lordships is one of fact, its proper determination turns upon the application of certain legal principles to the facts proved, and the true conclusion to be drawn from these facts viewed in the light of these principles.

It is much to be regretted, therefore, that the attention of the High Court was not directed to the two authorities in which those principles have been laid down—in the first by Lord Westbury, and in the second by Lord Davey—namely, the cases of *Appovier* v. *Rama Subba Aiyan* (1) and *Balkishen Das* v. *Ram Narain Sahu* (2). In both these cases the members of a joint Hindu family, some of them being minors, acting by and through their parents, executed instruments in writing providing, in the first case, that part, and, in the second case, that the whole, of the joint family property should belong to and be enjoyed by the different members of the family in specified shares. The effect of this was held to be that, as to the property so dealt with, there was a division of rights; the status of the family was changed; the tenancy of the property severed and converted from something, to use the language of English law, like a joint tenancy into a tenancy-in-common, and the previously undivided family became by operation of law divided.

At p. 89 of the report of the first case, Lord Westbury is reported to have expressed himself thus :—

"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he—that particular member—has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must

(1) (1866) 11. Moore's I. A., 75. (2) (1903) I. L. R., 30 Calc., 738; L. R. 30 I. A. 139.

1900

PARBATI v. NAUNIHAL SINGH.

petition contained a provision that Dalip Singh was to be lambardar in certain mauzas therein named, and Musammat Rani, under the sarabarahkarship of Dalip Singh, lambardar in certain other mauzas, and Musammat Phul Kunwar in the Patti, namely Shadi Ramwala in Shikarpur. This petition purports to be presented by Dalip Singh and Musammat Rani, on behalf of herself and "as guardian and patron of her minor son Naunihal Singh," and Musammat Phul Kunwar,—Musammat Rani through her brother, Shib Charan, and Musammat Phul Kunwar through her son Dalip Singh. On the same day, the 13th June 1866, an order was made by the Deputy Collector setting forth that the Tahsildar had been "asked to submit a report relating to the lambardarship and sarbarahkarship of the widow of Nirmal Singh," and directing the application (*i.e.* the petition), to be also sent to the Tahsildar "asking him to give the particulars in detail." On the 1st July 1866, the Tahsildar reports that—

"The Kanungo verified the contents of this application (*i.e.*, the petition) from Musammat Phul Kunwar and Musammat Rani . . . who stated that the dispute between them had been settled, and that the applicants had filed the application after settlement of the matter, and that it should be filed with the record."

Upon this the Deputy Collector, on the 2nd July 1866, ordered the application to be brought forward with the record. The petition was thus treated as a serious business transaction by the officer before whom it came. Entries were made in the village papers in accordance with it, and continued to be so made up to the death of Dalip Singh, in 1899, *i.e.* for a period of 33 years. Yet it is this petition that is now impeached by the plaintiff in paragraph 8 of his plaint as "a mere paper proceeding," and the management by Dalip Singh under it described as in no way affecting "the property and business of the joint Hindu family." The High Court deals with it in the following passages of its judgment:

"The petition, in our opinion amounts to no more than a compromise between the two widows, an arrangement for the management of the estate for the time being, and for the purpose of supplying the revenue authorities with the names of persons to be appointed lambardars of the several villages comprised in it, and the nominal apportionment of shares between the plaintiff and Dalip can be considered to be no more than an expression of the ladies' opinion that that was the measure of their interest in the family estate. Musammat Phul

Kunwar takes care that her interest (though she really had no greater interest than as mentioned above) shall be safeguarded, and in that she is imitated by Musammat Rani . . . We cannot find that it had the effect of working a separation in a family which it is now admitted was joint at the time when this petition was prepared.

In another passage of the judgment of the High Court it is said that the statement with which the petition opens—namely, that after the death of Nirmal Singh disputes arose between the applicants in connection with the estate of Tara Singh, the ancestor of the executants, which has been settled by mutual consent in this way—"Supplies the key to and explains why the petition was presented." The most natural and effectual way, however, of terminating such disputes would have been to divide the property between the different members of the family in definite shares, each member becoming entitled to the profits and bearing the losses of his allotted share, substantially as the law would have done. This is precisely what this settlement purports to effect. The High Court fail altogether to explain how the empty form of getting the applicants' names entered in the village papers as lambardars of distinct mauzahs—the property remaining joint and continuing under the management of Dalip Singh—would have conduced to the settlement of any disputes, or how the desire which they attribute to the two widows to appropriate a large portion of the income of the property could be gratified by such means, unless the partition was a real transaction, intended by the widows and Dalip Singh to be operative from the first. The settlement secured to them no benefit whatever, and therefore, the more rapacious they were, the greater the probability that the partition was a real transaction.

With all respect to the learned Judges of the High Court their Lordships are quite unable to concur in their view. The parol evidence is to a great extent worthless. Many of the witnesses depose to matter of which they obviously can know nothing. In some instances they go the length of stating what was the nature of a certain law suit instituted by the parties to the present appeal, or by Dalip Singh. No attested copies of the proceedings in those suits were produced, nor was any excuse given for their non-production. But of the numerous documents given in evidence many are absolutely inconsistent with the continuance

1909

PARBATI
v.
NAUNIHAL
SINGH.

it is on account of her share of the rents of the property? Agair 15 receipts were given in evidence bearing dates from June, 186 to March 1875, signed on behalf of Musammat Rani by eithe Lalji Mal or Shib Charan, or sometimes by both. They eac bear the signatures of two or more witnesses. On the face o them they purport to contain statements of account between th lady and Dalip Singh in respect of her half-share of some incom from the estate. They are, if genuine documents recording real transactions, inexplicable on any hypothesis other than that the partition of the joint estate, at least in right and interest, had actually taken place. The High Court disposes of them by hold ing that neither Lalji Mal nor Shib Charan had, under the instru ments appointing them, power to settle accounts with, or receive money from, Dalip Singh on behalf of their principal; and therefore she, Musammat Rani, would not be bound by these receipts. That is not, however, quite so clear as is assumed; but even if it were so, that criticism might be very just if Musammat Rani were suing Dalip Singh or his representatives for an account insisting on profits received by him on her account, and he were by the receipt to he getting credit for the sum acknowledged show the effect and have been paid; but it fails altogether to evidence in the present ca ght of these done apparently to the these two agents of Rani. It taking of accounts between manufacture of fictitious receip er her share" of the family prono conceivable object. If they 59, vour of Rs. 1,000 or Rs. 1,100; record a course of dealing which n She authorized him to apply the continuance of the joint owne his own, in redemption of the perty. d, each bearing date the

It is unnecessary to examine all the ni, by the pen of Lalji case. Few, if any, of them are inconsisten and the other a comcase; many of them are quite inconsisten years of age, by int High Court examined them carry out their l , however, in what, in their those instruments ous method. They apparently a list of all ocument was by itself suffici ecuted by Rani, sumptio that, as the plaintiff these villages, t Hir ily before 1861, it co hold expenses, occasions of



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Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... 7 a. 6 p. (1 a. 6 p.)

Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... 1 a. 6 p. (1 a.)

Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1903 ... ... Rs. 3-10. (8 a.)

Act VIII of 1899 (Petroleum), as modified up to 1st December, 1904 ... 7 a (1 a.)

Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... ... 1 a (1 a.)

Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ... ... 6 a 6 p. (1 a.)

Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... 5 a. 6 p (1 a)

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... 6 a. 6 p. (1 a.)

Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... 1 a. 9 p. (1 a)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 ... ... 13 a. (2 a.)

Regulation VI of 1886 (Ajmer Rural Boards) as modified up to 1st February, 1897 ... ... 5 a. 6 p. (1 a.)

Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891 ... ... 5 a (1 a)

Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... 4 a. 9 p (1 a)

Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 ... ... 6 a (1 a)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1834 to 1905.
Regulations made under the Statute 30 Vict., Cap. 3, from No. II of 1873 to 1905. 8vo. stitched.

[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1903, with foot-notes brought down to 1st December, 1904... In Urdu 2 a. 6 p. (1 a.)

Act XX of 1847 (Copyright), as modified up to 1st May, 1906 ... ... In Urdu 1 a. 3 p. (1 a.)

Act XX of 1847 Copyright as modified up to 1st May, 1896	In Nagri. 1 *a*. 3 *p*. (1 *a*.)
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	In Urdu. 6 *p* (1. *a*)
Ditto ditto	In Nagri. 6 *p*. (1 *a*.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu. 6 *p*. (1 *a*.)
Ditto ditto	In Nagri. 6 *p*. (1 *a*.)
Act XXX of 1853 (Naturalization), as modified up to 1st December, 1903	In Urdu 6 *p*. (1 *a*)
Ditto ditto	In Nagri. 6 *p*. (1 *a*.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	In Urdu. 3 *p*. (1 *a*.)
Ditto ditto	In Nagri. 3 *p*. (1 *a*)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	In Urdu. 6 *p*. (1 *a*.)
Ditto ditto	In Nagri. 6 *p*. (1 *a*)
Act XX of 1856, as modified up to 1st November, 1903	In Urdu. 2 *a*. 6 *p*. (1 *a*.)
Ditto ditto	In Nagri. 2 *a*. 6 *p*. (1 *a*)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	In Urdu. 1 *a* (1 *a*.)
Ditto ditto	In Nagri. 1 *a*. (1. *a*.)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	In Urdu. 1 *a* (1. *a*.)
Ditto ditto	In Nagri. 1, *a*. (1 *a*.)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu. 1 *a*. 6 *p*. (1 *a*.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	In Urdu. 3 *p*. (1 *a*)
Ditto ditto	In Nagri. 3 *p*. (1 *a*.)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	In Urdu. 3 *p*. (1 *a*)
Ditto ditto	In Nagri. 3 *p*. (1 *a*.)
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	In Urdu. Re. 1-5 (5 *a*.)
Ditto ditto	In Nagri. Re. 1-5 (5 *a*.)
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu. 2 *a*. 9 *p*. (1 *a*)
Ditto ditto	In Nagri. 2 *a* 9 *p*. (1 *a*.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	In Urdu. 1 *a*. 3 *p*. (1 *a*.)
Ditto ditto	In Nagri. 1 *a*. 3 *p*. (1. *a*.)
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	In Urdu. 1 *a*. (1 *a*)
Ditto ditto	In Nagri. 1 *a* (1 *a*.)
Act VI of 1864 (Whipping), as modified up to 1st April, 1900	In Urdu. 1 *a*. 6 *p*. (1 *a*.)
Ditto ditto	In Nagri 1 *a*. 6 *p*. (1 *a*)
Act III of 1865 (Carriers) as modified up to 31st May, 1903	In Urdu. 9 *p*. (1 *a*).
Ditto ditto	In Nagri. 9 *p*. (1 *a*)
Act III of 1867 (Gambling), as modified to 1st December, 1896	In Nagri. 2 *a*. (1 *a*.)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895	In English, Urdu, and Nagri. Bound. Rs. 3 (5 *a*.)
Ditto ditto	Unbound. Rs. 2-8. (5 *a*)
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Ditto as modified up to 1st October, 1899	In Nagri. 8 *a* 9 *p*. (1 *a*.)
Act I of 1871 (Cattle trespass) as modified up to 1st December, 1903	In Urdu. 1 *a*. 9 *p*. (1 *a*.)
Ditto ditto	In Nagri. 1 *a*. 9 *p*. (1 *a*.)
Act XXIII of 1871 (Pensions)	In Urdu. 9 *p* (1 *a*.)
Ditto	In Hindi. 9 *p*. (1 *a*.)
Act I of 1872 (Evidence), as modified up to 1st May, 1905	In Urdu. 8 *a*. (2 *a*.)
Ditto ditto	In Nagri. 8 *a*. (2 *a*.)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	In Urdu. 2 *a*. 6 *p* (1 *a*. 6 *p*)
Act IX of 1872 (Contract), as modified up to 1st September, 1899	In Urdu. 9 *a*. 9 *p*. (3 *a*.)

Act IX of 1872 (Contract), as modified up to 1st September, 1899 ... In Nagri. 9 a. 6 p

Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ... In Urdu. 4 a. (2

Ditto ditto ... In Nagri. 4 a. (2

Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 In Urdu. 9 p. (1

Ditto ditto ... In Nagri. 9 p. (1,

Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899 ... In Urdu. 3 a 3 p

Ditto ditto ... In Nagri. 3 a. 3 p

Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... In Urdu 9 p. (1 a

Ditto ditto ... In Nagri 1 a. (1 a

Act IX of 1875 (Majority), as modified up to 1st May, 1906 ... In Urdu. 3 p (1 a)

Ditto ditto ... In Nagri. 3 p. (1 a

Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... In Urdu 4 a 6 p. 6 p)

Ditto ditto ... In Nagri. 4 a 3 p 6 p)

Act III 1877 (Registration), as modified up to 1st December, 1896 ... In Urdu 4 a 3 p. (2

Ditto ditto ... In Nagri. 4 a. 6 p (2

Act I of 1878 (Opium), as modified up to 1st December, 1896 ... In Nagri. 1 a. 0 p (

Act VII of 1878 (Forests), as modified up to 1st December 1903 ... In Urdu. 4 a (1 a 6

Ditto ditto ... In Nagri. 3 a 9 p (1 a

Act XI of 1878 (Arms), as modified up to 1st May, 1904 ... In Urdu. 2 a (1 a.)

Ditto ditto ... In Nagri. 2 a (1 a)

Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1903 In Urdu. 2 a (1 a)

Ditto ditto ... In Nagri. 2 a. (1 a)

Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 In Urdu. 2 a. 6 p (1

Ditto ditto ... In Nagri. 2 a 6 p. (1

Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... In Urdu. 1 a. 6 p (1

Ditto ditto ... In Nagri 1 a. 6 p. (1

Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898 ... In Urdu. 9 a. (1 a. 6 p

Ditto ditto ... In Nagri. 9 a. (1 a. 0

Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ... In Urdu. 6 a 9 p. (2 a

Ditto Ditto ... In Nagri. 6 a 9 p (3 a

Act VI of 1882 (Companies), as modified up to 1st August, 1906 ... In Urdu 13 a. 9 p (3 a

Ditto ditto ... In Nagri. 14 a. (3 a)

Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December 1899 ... In Urdu. Rs. 1-4. (6 a)

Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1903 ... In Urdu. 1 a. (1 a.)

Ditto ditto ... In Nagri. 1 a. (1 a.)

Act XXI of 1883 (Emigration), as modified up to 1st December, 1903 ... In Urdu. 4 a 3 p (1 a. 6 p

Ditto ditto ... In Nagri. 4 a. 6 p. (1 a. 6 p

Act IV of 1884 (Explosives), as modified up to 1st May, 1906 ... In Urdu. 1 a. 3 p. (1 a)

Ditto ditto ... In Nagri. 1 a. 3 p. (1 a)

Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ... In Urdu. 3 a. 6 p. (1 a. 6 p

Ditto ditto ... In Nagri. 3 a. 6 p. (1 a 6 p

Act XII of 1884 (Agricultural Loans) as modified up to 1st September, 1900 In Urdu. 6 p (1 a.)

Ditto ditto ... In Nagri. 6 p. (1 a.)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... In Urdu. 2 a 0 p. (1 a.)

Act II of 1885 (Negotiable Instruments Amendment). ... In Urdu. 9 p. (1 a)

Act III of 1885 (Transfer of Property Amendment) ... In Urdu. 3 p. (1 a)

Act X of 1885 (Oudh Estates Amendment) ... In Urdu. 3 p. (1 a.)

Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905 ... In Urdu. 1 a 6 p (1 a)

Act XXI of 1885 (Madras Civil Courts Amendment) ... In Urdu 3 p. (1 a)

Act	Price
Act II of 1886 (Income-tax), as modified up to 1st April, 1903	In Urdu. 3 a. (1 a. 9 p.)
Ditto ditto ...	In Nagri. 3 a. (3 a. 9 p.)
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu. 3 p. (1 a.)
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu. 1 a. 3 p. (1 a.)
Act VII of 1886 (Registration Amendments)	In Urdu. 3 p. (1 a.)
Act X of 1886 (Criminal Law Amendment)	In Urdu. 9 p. (1 a.)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu. 3 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 3 p. (1 a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act VI of 1887 (Companies Amendment)	In Urdu. 3 p. (1 a.)
Act VII of 1887 (Suits' Valuation)	In Urdu. 9 p. (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu. 2 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 2 a. 6 p. (1 a.)
Act X of 1887 (Native Passenger Ships)	In Urdu. 1 a. 6 p. (1 a.)
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 1 a. 3 p. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu. 3 a. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 3 a. 6 p. (1 a.)
Act XV of 1887 (Burma Military Police), ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVIII of 1887 (Allahabad University)	In Urdu. 1 a. (1 a.)
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu 6 p. (1 a.)
Ditto (as passed)	In Nagri. 6 p. (1 a.)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu 3 p. (1 a.)
Ditto (as passed)	In Nagri. 3 p. (1 a.)
Act V of 1888 (Inventions and Designs)	In Urdu. 2 a. 3 p. (1 a.)
Act VI of 1888 (Debtors)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri. 6 p. (1 a.)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu. 1 a. 9 p. (1 a.)
Ditto	In Nagri. 1 a. 9 p. (1 a.)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	In Urdu. 6 p. (1 a.)
Ditto ditto ...	In Nagri. 6 p. (1 a.)
Act II of 1889 (Measures of Length)	In Urdu. 3 p. (1 a.)
Ditto	In Nagri 3 p. (1 a.)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu. 1 a. 9 p. (1 a.)
Ditto ditto ...	In Nagri 2 a. (1 a.)
Act VI of 1889 (Probate and Administration)	In Urdu. 6 p. (1 a.)
Ditto	In Nagri 6 p. (1 a.)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu. 6 a. (2 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri. 3 a. (1 a. p.)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1894 ...	In Urdu. 9 p. (1 a.)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act XVI of 1889 (Central Provinces Land Revenue) ...	In Urdu. 1 a. 6 p. (1 a.)
Ditto	In Nagri 1 a. 6 p. (1 a.)
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu. 3 p. (1 a.)
Act I of 1890 (Revenue Recovery)	In Urdu. 3 p. (1 a.)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu. 3 p. (1 a.)
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu. 6 p. (1 a.)
Act VI of 1890 (Charitable Endowments)	In Urdu. 6 p. (1 a.)
Act VIII of 1890 (Guardians and Wards)	In Urdu. 2 a. 3 p. (1 a. 9 p.)
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu. 8 a. (2 a.)
Act IX of 1890 (Railways), as modified up to 1st May, 1893	In Nagri. 8 a. (2 a.)

Act	Edition and price
Act X of 1890 (Press and Registration of Books Amendment) ...	... In Urdu. 3 p. (1 a)
Act XI of 1890 (Prevention of Cruelty to Animals) ...	... In Urdu. 3 p. (1 a)
Act XVIII of 1890 (Emigration Amendment) ...	... In Urdu. 3 p. (1 a.)
Act XIX of 1890 (Salt Amendment) ...	... In Urdu. 3 p. (1 a)
Act XX of 1890 (North-Western Province and Oudh) ...	... In Urdu. 1 a. (1 a.)
Act V of 1891 (Ports Act Amendment) ...	... In Urdu. 3 p (1 a)
Act X of 1891 (Indian Criminal Law Amendment) ...	... In Urdu. 3 p. (1 a)
Act XIV of 1891 (Oudh Courts) ...	... In Urdu. 6 p. (1 a)
Act XVIII of 1891 (Bankers Books Evidence), as modified by Acts I of 1893 and XII of 1900	... In Urdu. 3 p. (1 a.)
Ditto ditto	... In Nagri. 6 p. (1 a)
Act II of 1892 (Christian Marriage Validation)	... In Urdu. 3 p. (1 a)
Act IV of 1892 (Bengal Court of Wards Amendment) ...	... In Urdu. 6 p. (1. a)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	... In Urdu. 3 p. (1 a)
Act IV of 1893 (Partition)...	... In Urdu. 3 p. (1 a)
Act I of 1894 (Land Acquisition)	... In Urdu. 2 a 3 p. (1a 6p
Ditto	... In Nagri. 1 a 6 p (1a. 6p
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	... In Urdu. 3 p. (1 a.)
Act V of 1894 (Civil Procedure Code Amendment)	... In Urdu. 3 p (1 a.)
Ditto	... In Nagri 3 p (1 a)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	... In Urdu. 4 a. (1 a)
Ditto ditto ...	... In Nagri. 3 a 9 p. (2 a)
Act IX of 1894 (Prisons)	... In Urdu. 1 a. 3 p. (1 a.)
Ditto	... In Nagri 2 a. 3 p. (1 a.
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu. 3 p. (1 a)
Ditto ditto	... In Nagri. 3 p (1 a.)
Act XII of 1895 (Companies—Memorandum of Association) ...	... In Urdu. 3 a. (1 a.)
Act XIV of 1895 (Pilgrim Ships)	... In Urdu 1 a 3 p. (1 a)
Act II of 1896 (Cotton-duties)	... In Urdu 1 a 3 p. (1 a.)
Ditto	... In Nagri 1 a (1 a)
Act VI of 1896 (Indian Penal Code Amendment)	... In Urdu. 3 p. (1 a)
Act VIII of 1896 (Inland Bonded Warehouses)	... In Urdu. 3 p. (1 a.)
Ditto	... In Nagri. 3 p. (1 a)
Act XII of 1896 (Excise), as modified up to 1st August 1903 ...	... In Nagri. 3 a. 3 p. (1 a)
Act I of 1897 (Act XXXVII of 1850 Amendment)	... In Urdu. 3 p. (1 a.)
Ditto	... In Nagri. 3 p. (1 a)
Act II of 1897 (Criminal Tribes Act Amendment)	... In Urdu. 3 p. (1 a.)
Act III of 1897 (Epidemic Diseases)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act IV of 1897 (Fisheries)	... In Urdu. 3 p (1 a)
Ditto	... In Nagri. 3 p. (1 a)
Act VI of 1897 (Negotiable Instruments Act Amendment) ...	... In Urdu. 3 p (1 a)
Ditto ditto ...	... In Nagri. 3 p (1 a)
Act VII of 1897 (Indian Emigration Act Amendment) ...	... In Urdu. 3 p. (1 a)
Ditto ditto ...	... In Nagri. 9 p. (1 a)
Act VIII of 1897 (Reformatory Schools)	... In Urdu. 3 p. (1 a)
Ditto	... In Nagri. 9 p. (1 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903	... In Urdu. 9 p. (1 a)
Ditto ditto	... In Nagri. 9 p (1 a)
Act X of 1897 (General Clauses)	... In Urdu. 1 a. (1 a.)
Ditto	... In Nagri. 1 a. (1 a.)
Act XII of 1897 (Local Authorities Emergency Loans) ...	... In Urdu. 3 p. (1 a.)
Ditto ditto ...	... In Nagri. 3 p. (1 a.)
Act XV of 1897 (Cantonments)	... In Urdu. 3 p. (1 a.)
Act I of 1899 [[illegible]-carriages Act (1861) Amendment] ...	... In Urdu. 3 p. (1 a.)

Act		Language	Price
t I of 1898 [Stage Carriages Act (1861) Amendment]	... ...	In Nagri.	3 p. (1 a.)
t III of 1898 (Lepers)	...	In Urdu.	6 p. (1 a.)
Ditto	...	In Nagri.	6 p. (1 a.)
t IV of 1898 (Indian Penal Code Amendment)	...	In Urdu.	3 p. (1 a.)
t V of 1898 (Code of Criminal Procedure) as modified up to 1st April, 1900	...	In Urdu.	Re. 1-4. (8 a.)
Ditto ditto	...	In Hindi.	Re. 1-6. (8 a.)
t VI of 1898 (Post Office)	...	In Urdu.	2 a (1 a.)
Ditto	...	In Nagri.	2 a. (1 a.)
t IX of 1898 (Live-stock Importation)	...	In Urdu.	3 p. (1 a.)
Ditto	...	In Nagri.	3 p. (1 a)
t X of 1898 (Indian Insolvency Rules)	...	In Urdu.	3 p (1 a)
t I of 1899 [Indian Marine Act (1887) Amendment] ...	...	In Urdu.	6 p. (1 a.)
Ditto ditto ...	...	In Nagri.	6 p (1 a.)
t II of 1899 (Stamp), as modified up to 31st August, 1905 ...	...	In Urdu.	7 a. 6 p. (1a. 6p.)
Ditto ditto ...	...	In Nagri	7 a 6 p (1a. 6p.)
t III of 1900 (Prisoners), as modified up to 1st March, 1905	...	In Urdu.	2 a. 3 p. (1 a.)
Ditto ditto	...	In Nagri.	2 a. 3 p. (1 a.)
t IV of 1899 (Government Buildings)	...	In Urdu.	3 p. (1 a.)
Ditto	...	In Nagri.	3 p. (1 a.)
t VII of 1899 [Indian Steam-vessels Act (1884) Amendment]	...	In Urdu.	3 p (1 a.)
Ditto ditto	...	In Nagri.	3 p. (1 a)
t VIII of 1899 (Petroleum)	...	In Urdu.	9 p. (1 a.)
Ditto	...	In Nagri.	9 p. (1 a.)
t IX of 1899 (Arbitration)	...	In Urdu.	9 p. (1 a.)
Ditto	...	In Nagri.	9 p. (1 a.)
t XI of 1899 (Court-fees Amendment)	...	In Urdu.	9 p. (1 a.)
Ditto	...	In Nagri.	6 p. (1 a.)
t XII of 1899 (Currency Notes Forgery)	...	In Urdu.	3 p. (1 a.)
Ditto	...	In Nagri.	3 p. (1 a.)
t XIV of 1899 (Tariff Amendment)	...	In Urdu.	3 p. (1 a.)
Ditto	...	In Nagri.	3 p. (1 a.)
XVII of 1899 (Indian Registration Amendment ...	...	In Urdu.	3 p. (1 a.)
Ditto ditto ...	...	In Nagri.	3 p. (1 a.)
XVIII of 1899 (Land Improvement Loans Amendment) ...	...	In Urdu.	3 p. (1 a.)
Ditto ditto ...	...	In Nagri.	3 p. (1 a.)
XX of 1899 (Presidency Banks)	...	In Urdu.	3 p. (1 a.)
Ditto	...	In Nagri.	3 p. (1 a)
XXI of 1899 (Central Provinces Tenancy Amendment) ...	...	In Urdu.	3 p. (1 a.)
Ditto ditto ...	...	In Nagri.	3 p. (1 a.)
XXIV of 1899 (Central Provinces Court of Wards) ...	...	In Urdu.	1 a. 3 p. (1 a.)
Ditto ditto ...	...	In Nagri.	1 a. 3 p. (1 a.)
I of 1900 (Indian Articles of War Amendment) ...	...	In Urdu.	3 p (1 a)
Ditto ditto ...	...	In Nagri.	3 p. (1 a.)
IV of 1900 [Indian Companies (Branch Registers)] ...	...	In Urdu.	3 p. (1 a.)
Ditto ditto ...	...	In Nagri.	3 p. (1 a.)
IX of 1900 (Amendment) of Court-fees Act, 1870) ...	...	In Urdu.	3 p. (1 a.)
Ditto ditto ...	...	In Nagri.	3 p. (1 a)
X of 1900 (Census)	...	In Urdu.	9 p. (1 a.)
Ditto	...	In Nagri.	9 p. (1 a)
II of 1901 [Indian Tolls (Army)]	...	In Urdu.	6 p. (1 a.)
Ditto	...	In Nagri.	9 p. (1 a.)
III of 1901 (Indian Ports)	...	In Urdu	3 p. (1 a.)
V of 1901 [Indian Forest (Amendment)]	...	In Urdu.	3 p. (1 a.)
Ditto	...	In Nagri.	3 p. (1 a.)
VI of 1901 (Assam Labour and Emigration)	...	In Urdu.	5 a. (2 a)

Act	Price
Act VI of 1901 (Assam Labour and Emigration) ...	In Nagri. 5 a. (2 a)
Act VII of 1901 (Native Christian Administration of Estates) ...	In Urdu. 3 p. (1 a.)
Ditto ditto ...	In Nagri. 3 p (1 a)
Act VIII of 1901 (Mines) ...	In Urdu. 1 a (1 a)
Ditto ...	In Nagri 1 a (1 a)
Act IX of 1901 ...	In Urdu. 3 p. (1 a)
Ditto ...	In Nagri. 3 p. (1 a)
Act X of 1901 ...	In Urdu. 3 p. (1 a)
Ditto ...	In Nagri. 3 p. (1 a)
Act II of 1902 [Cantonments (House-Accommodation)] ...	In Urdu. 1 a (1 a)
Ditto ditto ...	In Nagri. 1 a. (1 a)
Act IV of 1902 (Indian Tramways) ...	In Urdu. 3 p (1 a)
Ditto ...	In Nagri. 3 p. (1 a)
Act V of 1902 (Administrators General and Official Trustees) ...	In Urdu 3 p (1 a)
Ditto ditto ...	In Nagri 3 p. (1 a)
Act VII of 1902 [United Provinces (Designation)] ...	In Urdu. 3 p (1 a)
Act VIII of 1902 (Indian Tariff) ...	In Urdu 3 p. (1 a)
Ditto ...	In Nagri. 3 p (1 a)
Act II of 1903 [Indian Post Office (Amendment)] ...	In Urdu 3 p. (1 a)
Ditto ...	In Nagri. (3 p 1 a)
Act III of 1903 (Electricity) ...	In Urdu 2 a 6 p. (1 a 6 p.)
Ditto ...	In Nagri. 2 a 6 p. (1 a 6 p)
Act V of 1903 (Ports) ...	In Urdu. 3 p (1 a) (2 a 6 p)
Ditto ...	In Nagri 3 p (1 a)
Act VII of 1903 (Works of Defence) ...	In Urdu. 1 a 3 p (1 a)
Ditto ...	In Nagri. 1 a 3 p (1 a)
Act VIII of 1903 (Probate and Administration) ...	In Urdu. 3 p (1 a)
Ditto ...	In Nagri 1 a. 3 p. (1 a)
Act IX of 1903 (Tea Cess) ...	In Urdu 3 p (1 a)
Ditto ...	In Nagri 3 p (1 a)
Act X of 1903 (Victoria Memorial) ...	In Urdu 3 p. (1 a)
Ditto ...	In Nagri. 3 p (1 a)
Act XIII of 1903 (Lepers) ...	In Urdu 3 p. (1 a)
Ditto ...	In Nagri 3 p. (1 a.)
Act XIV of 1903 (Indian Foreign Marriages) ...	In Urdu. 3 p. (1 a)
Ditto ...	In Nagri. 3 p (1 a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ...	In Urdu. 1 a 9 p. (1 a)
Ditto ditto ...	In Nagri. 1 a. 9 p (1 a)
Act I of 1904 (Poisons) ...	In Urdu. 6 p. (1 a.)
Ditto ...	In Nagri. 6 p. (1 a)
Act III of 1904 (Local Authorities Loan) ...	In Urdu. 3 p (1 a.)
Ditto ...	In Nagri. 3 p. (1 a)
Act IV of 1904 (North-West Border Military Police) ...	In Urdu. 9 p. (1 a)
Act VI of 1904 [Transfer of Property (Amendment)] ...	In Urdu. 3 p (1 a)
Ditto ditto ...	In Nagri. 3 p (1 a)
Act VII of 1904 (Ancient Monuments Preservation) ...	In Urdu. 9 p. (1 a)
Ditto ditto ...	In Nagri. 9 p. (1 a.)
Act VIII of 1904 (Indian Universities) ...	In Urdu. 1 a. 3 p. (1 a.)
Ditto ...	In Nagri. 1 a. 3 p. (1 a)
Act X of 1904 (Co-operative Credit Societies) ...	In Urdu. 1 a. (1 a)
Ditto ...	In Nagri. 1 a. (1 a)
Act XI of 1904 to revive and continue section 8 B of the Indian Tariff Act, 1894 ...	In Urdu. 3 p (1 a.)
Ditto Ditto ...	In Nagri. 3 p. (1 a.)
Act XII of 1904 (Emigration) ...	In Urdu. 3 p. (1 a.)
Ditto ...	In Nagri. 3 p. (1 a.)

Act XIII of 1904 (Indian Articles of War)	In Urdu	3 p. (1 a.)
Ditto	In Nagri.	3 p. (1 a.)
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu.	3 p. (1 a)
Ditto	In Nagri.	3 p. (1 a)
Act I of 1905 [Local Authorities Loan (Amendment)] ...	In Urdu.	3 p. (1 a.)
Ditto ditto ...	In Nagri.	3 p (1 a.)
Act II of 1905 [Indian Universities (Validation)] ...	In Urdu.	3 p (1 a)
Ditto ditto ...	In Nagri.	3 p. (1 a.)
Act III of 1905 (Indian Paper Currency) ...	In Urdu.	9 p. (1 a.)
Ditto	In Nagri.	9 p. (1 a)
Act IV of 1905 (Indian Railway Board)	In Urdu.	3 p. (1 a.)
Act VI of 1905 (Court-fees (Amendment)	In Urdu.	1 a 6 p. (1 a.)
Ditto	In Nagri.	3 p. (1 a.)
Act VII of 1905 (Bengal and Assam Laws)	In Urdu.	3 p. (1 a.)
Ditto	In Nagri.	3 p. (1 a.)
Regulation I of 1890 (British Baluchistan Laws)	In Urdu	2 a (1 a. 9 p)
Regulation V of 1890 (British Baluchistan Forests) ...	In Urdu	2 a. (1 a. 6 p.)
Regulation VI of 1893 (Hazara Forests)	In Urdu	2 a. (1 a. 6 p.)
Regulation VIII of 1896 (British Baluchistan Criminal Justice)	In Urdu	9 p (1 a.)
Regulation IX of 1896 (British Baluchistan Civil Justice) ...	In Urdu.	2 a 3 p (1 a)
Regulation III of 1901 (Frontier Crimes)	In Urdu	2 a. 6 p. (1 a.)
Regulation IV of 1901 (Frontier Murderous Outrages) ...	In Urdu.	6 p (1 a.)
Regulation VII of 1901 (North-West Frontier Province) ...	In Urdu.	4 a. 3 p. (1 a.

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In Urdu ... 3 a 8 p. (1 a 6 p)

... In Urdu ... 9 p. (1 a)

... 2 a. 6 p (1 a.)

TABLE OF CASES REPORTED.

TABLE OF CASES CITED.

INDEX.

consummation of the marriage. The plaintiff states that the amount of her dower was Rs. 20 000, that as the marriage was not consummated only one-half of that amount is payable by the husband, and that the plaintiffs are entitled to a half of that half, namely to Rs. 5,000. This sum the plaintiffs seek to recover in this suit. The Court of first instance dismissed the suit and the decree of that court was affirmed by the lower appellate court. It has been found by the learned Judge that at the time of her marriage Musammat Akbari was suffering from a serious illness which prevented consummation of the marriage and that she died of that illness. It has also been found that the defendant, her husband, was not aware that she was suffering from that illness at the time of the marriage, and that the fact of the illness was suppressed by the father of the girl. On these findings the learned Judge has come to the conclusion that the consent of the husband was obtained by fraud. As according to the finding of the court below, there was an active concealment of a fact which should have been brought to the notice of the husband in order to obtain his free consent to the marriage, a fraud was perpetrated on him at the time of the marriage. It is stated in Mr. Amir Ali's work on Muhammadan Law, Vol. II, p. 326, on the authority of the *Raddul Mukhtar* that "when consent to a contract of marriage has been obtained by force or fraud such marriage is invalid unless ratified." He also lays down on the same page that "a marriage contracted by a sick person is dependent on consummation, so that if he die of that illness without consummation, the contract is void and the woman has no right to dower or succession." The authority for this view is the *Sharaya*, which is an authority on *Shia* law, by which the parties to this case are not governed. But Mr. Amir Ali also says on the same page that, "it is needless to add that there is very little difference on these points between the *Shias* and the *Sunnis*." The learned vakil for the appellant contends that this is the learned author's own view only and that he has cited no authority in support of it. The learned vakil however has not been able to refer us to any authority which would justify us in coming to a different conclusion. He relies on the following passage on page 405 of the same work: "If the wife however was suffering from

1909

ABDUL LATIF KHAN v. NIYAZ AHMED KHAN.

some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs," and contends that this is inconsistent with the opinion expressed on page 326 as quoted above. We do not think this is so. What is referred to on page 405 is the case of a valid marriage, where there has been no fraud or coercion. As we have pointed out above, if a marriage was procured by fraud it is invalid. In this case according to the finding of the court below the marriage of the defendant with the deceased Musammat Akbari was the result of a fraud perpetrated upon him, and therefore it was an invalid marriage. It necessarily follows that the defendant was not liable to pay the dower of the deceased and the plaintiff's suit has been rightly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

1909
March 4.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

THAN CHAND (DECREE-HOLDER) *v.* JAGANNATH (JUDGMENT-DEBTOR).*

Code of Civil Procedure (Act XIV of 1882), section 310A—Act No. IV of 1882 (Transfer of Property Act), section 89—Sale held in pursuance of a decree under section 89 of the Transfer of Property Act.

The appellant obtained an order absolute under section 89 of the Transfer of Property Act, caused the property to be sold and purchased it himself. The judgment-debtor made an application under section 310 A of the Code of Civil Procedure for setting aside the sale. *Held* that in the absence of special rules framed by the High Court for carrying out orders under chapter IV of Act No. IV of 1882, the provisions of the Code of Civil Procedure applied and the application by the judgment-debtor could be entertained under section 310A.

THE facts of this case are as follows:—

The appellant, Lala Than Chand, got a decree for sale under a mortgage in a suit to which the respondent, Jagannath, was a party as puisne mortgagee. The decretal amount was not paid within the time fixed by the Court under section 88 of the Transfer of Property Act, 1882. The mortgagee decree-holder obtained an order absolute under section 89 of Act IV of 1882, and brought the mortgaged property to sale and purchased it himself. Jagannath deposited the purchase money and applied

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* [illegible] from a decree of Ahmad Ali Khan, officiating [illegible] Aligarh, dated the [illegible] of April 1908, [illegible] Subordinate Judge of Aligarh, dated the 15th of July 1907.

to have the sale set aside under section 310A of the Code of Civil Procedure, 1882. The lower Courts allowed the application. The decree-holder purchaser appealed to the High Court.

Babu *Surendra Nath Sen*, for the respondent, raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay. He cited *Bashir-ud-din* v. *Jhori Singh* (1), *Imtiazi Begam* v. *Dhuman Begam* (2). He further submitted that section 310A of the Civil Procedure Code did apply to a sale held in virtue of an order absolute under section 89 of the Transfer of Property Act. He relied on *Raja Ram Singhji* v. *Chunni Lal* (3), *Mallikarjunadu Setti* v. *Lingamurti Pantulu* (4), *Krishnaji* v. *Mahadev Vinayak* (5).

Maulvi *Shafi-uz-zaman*, for the appellant, contended that section 310A of the Code of Civil Procedure did not apply to a sale carried out in pursuance of section 89 of the Transfer of Property Act, 1882 He relied on *Kedar Nath Raut* v. *Kali Charan Ram* (6). When an order absolute was passed under section 89, the puisne mortgagee lost his right to redeem the property and he was thereby precluded from availing himself of the equitable provisions of section 310A.

KNOX and GRIFFIN, JJ.—A preliminary objection is raised to the hearing of this appeal, but we do not think it necessary to decide it, as independently of the objection we are of opinion that the appeal must fail.

The appeal before us is a second appeal and the contention raised by the decree-holder is to the effect that section 310A of the Code of Civil Procedure is not applicable to a sale carried out under the provisions of section 89 of the Transfer of Property Act. The sale in the present instance was carried out in pursuance of an order absolute passed under section 89 of the Transfer of Property Act. This High Court has not thought necessary to avail itself of the power given by section 104 of the Act to lay down any rules for carrying out orders under Chapter IV of Act No. IV of 1882. The suit out of which this appeal arose was a suit of the nature provided for in Chapter IV. In the absence of any special rule, the provisions contained in the Code

(1) (1896) I. L. R., 19 All., 140.
(2) (1907) I. L. R., 29 All., 275.
(3) (1897) I. L. R., 19 All., 205.
(4) (1902) I. L. R., 25 Mad., 244.
(5) (1900) I. L. R., 25 Bom., 107.
(6) (1898) I. L. R., 25 Calc., 703.

1909

THAN CHAND
v.
JAGANNATH.

of Civil Procedure for suits and execution proceedings in suits govern suits brought under the provisions of Chapter IV of the Transfer of Property Act. We are, therefore, prepared to hold that the sale which was carried out under Chapter XIX of the Code of Civil Procedure, was a sale to which the provision of section 310A are expressly made applicable and the decision of the lower appellate court is not open to question on this account. We were referred to several cases of the Calcutta and Bombay High Courts. Both of those courts have made special rules and the case decided by those courts differ, therefore, from the present case. Over and above this we should not be inclined to interfere unless it was absolutely necessary, seeing that the decree-holder has got his money and all that he is entitled to, in the interests of justice. He has endeavoured to take advantage of technical procedure in order to retain the mortgaged property, instead of being satisfied with the money due under the mortgage-bond. We dismiss the appeal with costs.

Appeal dismissed.

1909
March 22.

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Ashman and Mr. Justice Griffin.

NAJIB-ULLAH (DEFENDANT) v. GULSHER KHAN AND ANOTHER (PLAINTIFFS.)*

Act (Local) No. II of 1901, (Agra Tenancy Act), section 32—Division of occupancy holding—Suit for declaration of right—Suit maintainable.

A suit for a declaration of right to a share in an agricultural holding is maintainable and is not forbidden by the provisions of section 32, Agra Tenancy Act, 1901, *Ashiq Husain* v. *Asghari Begam* (1) followed. *Achhey Lal* v. *Joshi Prasad* (2) overruled.

THE facts of this case are as follows:—

One Imam Bux, the father of the parties, was possessed of an occupancy holding of considerable extent. He died before the present Tenancy Act came into operation. He left him surviving a widow and four sons. Under the Muhammadan law the plaintiffs were entitled to 14 *sihams* out of 32 *sihams*, and

* Appeal No. 48 of 1908 under section 10 of the Letters Patent.

(1) (1907) I. L. R., 30 All., 90. (2) (1903) I. L. R., 27 All., 65.

and they brought the present suit for a declaration of their right to that share. The Court of first instance decreed the plaintiffs' claim. The lower appellate court held that having regard to the provisions of section 32 of the Tenancy Act 1901, the suit could not be brought and accordingly dismissed it. The plaintiff appealed to the High Court. RICHARDS, J., set aside the decree of the lower appellate Court and remanded the suit.

The defendants appealed under section 10 of the *Letters* Patent. The appeal was referred to a Full Bench by STANLEY, C. J., and BANERJI, J.

Dr. *Tej Bahadur Sapru*, for the appellants:—The court was not competent to grant a declaration of the plaintiffs' right to the occupancy holding as that would directly defeat the provisions of section 32 of the Tenancy Act. In the Rent Act of 1881, there was no provision corresponding to section 32 of the present Act; this section was taken from the Bengal Tenancy Act (VIII of 1885) with a view to protect the landlord against any division of the tenancy. The landlord is entitled to look upon the holding as a single undivided one so that his right to collect rent may not be injuriously affected. Joint tenants cannot during the jointness of their tenure say that each of them has so much share in it and no more, and pay rent to the landlord accordingly. *Achhey Lal* v. *Janki Prasad* (1).

The effect of a declaration would be a division of the holding. Section 32, clause 2, says: "No suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained." If a share of one of several joint tenants be declared, it may affect the distribution of rent within the meaning of that section. There is no uniformity in the rulings upon this point. *Ashiq Husain* v. *Asghari Begam* (2) is against the appellant, but in this case the earlier ruling was not cited. *Ayub Ali Khan* v. *Mashuq Ali* (3), and *Ajudhia Singh* v. *Ram Dayal Upadhia* (4) were referred to. Division in section 32 may mean either actual physical division or definement of interest. The legislature meant that the integrity of a

(1) I. L. R., 20 All., 66.
(2) I. L. R., 30 All., 90.
(3) Weekly Notes, 1903, p. 231.
(4) Weekly Notes, 1903, p. 3.

1909

NAJIB-UL-LAH v. GULSHER KHAN.

holding should be strictly preserved and no attempt should be allowed to be made to break it either physically or otherwise. Maxwell on the Interpretation of Statutes, 4th *Edition*, p. 176. Moreover, such a declaration is practically useless. Section 42 of the Specific Relief Act is a discretionary section and the aid of this section should not be invoked for an infructuous object.

Mr. *Abdul Raoof*, for the respondents:—The object of section 32 is that so far as the relation of landlord and tenant is concerned it must remain intact. The first clause of the section says that *no* division of a holding or distribution of the rent in respect thereof shall be binding on the landlord. It does not prevent the division of the holding in any event. *Clause* 2 *of* the section should not be read as laying down a different rule. *Achhey Lal* v. *Janki Prasad* (1) does not apply to a case where the parties are Muhammadans. Referring to section 22, he submitted that where the tenancy devolves upon many persons and any one of them gets possession thereof to the exclusion of others, the excluded persons will be without any remedy. A declaration of title cannot militate against the objects of section 32. *Ashiq Husain* v. *Asghari Begam* (2).

Dr. *Tej Bahadur Sapru* replied.

The following judgments were delivered:—

AIKMAN, J.—This appeal has been referred to a Bench of three Judges on account of conflicting decisions of this Court upon the main question which arises in the appeal. That question, shortly stated, is whether a co-sharer in an agricultural holding is barred by the provisions of section 32 of the Tenancy Act from maintaining a suit for declaration of his rights in the holding. In the case *Achhey Lal* v. *Janki Prasad* (1), it was held that a suit of this nature could not be maintained having regard to the provisions of the section quoted. In the cases *Ashiq Husain* v. *Asghari Begam* (2), and *Ayub Ali Khan* v. *Mashuq Ali Khan* (3), a different view was taken and it was held that the section does not preclude a plaintiff from obtaining by suit a declaration of his right to a share in a holding. In the last two cases it does not appear that the decision in *Achhey Lal* v. *Janki Prasad* was cited and no reference is made to it in either of

(1) (1903) I. L. R., 25 All., 63. (2) (1907) I. L. R., 30 All., 60.
(3) Weekly Notes, 1903, p. 231.

these cases. Section 32 (1) does not forbid the co-sharers in a holding dividing the holding or making a distribution of the rent amongst themselves. It merely declares that such division or distribution shall not be binding on the land-holder unless it is made with his consent. Sub-section (2) enacts that no suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any Civil or Revenue Court. In the case, *Achhey Lal* v. *Janki Prasad*, it was observed that a Civil or Revenue court should not entertain a suit or other proceeding which has the effect of causing the division of a holding. With this observation I entirely agree, and if I were of opinion that a declaratory decree as to his rights obtained by one co-sharer in a holding against the other co-sharers would necessarily result in a division of the holding or a distribution of the rent, I should have no hesitation in accepting the view expressed in the case last mentioned. But it appears to me that a declaration as to his rights obtained by one co-sharer against the other co-sharers does not and cannot effect any] division of the holding or distribution of the rent thereof. Notwithstanding such a declaration the holding would remain as before a single holding and the co-sharers would continue jointly responsible to the land-holder for the rent. No doubt, if having got his declaration the plaintiff attempted on the strength of it to sue for an actual division of the land or a distribution of the rent, his suit would be barred by the provisions of section 32 (2). To hold that a co-sharer in a holding, who is deprived by the other co-sharers of the whole or a portion of his interest therein cannot maintain a suit for a declaration of his rights would amount to a denial of justice, as, so far as I can see, he would have no other remedy. Section 22 provides that when an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant dies, his interest in the holding shall devolve on his male lineal descendants in the main line of descent. Under this section if a tenant dies leaving two sons, his sons become co-sharers in the holding. If one son usurps the whole holding to the exclusion of his brother, the law could never have intended that in such a case the latter should be left entirely without a remedy. The court of first appeal held that the present suit, which was brought by the

1900

NAJIB-UL-LAH v. GULSHER KHAN.

plaintiffs respondents, not for an actual division of the holding, but for a declaration against their co-sharers as to the extent of their interest therein, was not maintainable having regard to the provisions of section 32 and the ruling in *Achhey Lal* v. *Janki Prasad*. Our learned colleague whose judgment is under appeal sustained the plea that the court of first appeal was wrong in so holding and remanded the case for trial on the merits under section 562 of the former Code of Civil Procedure. In the appeal before us the ground taken is that "the suit being one virtually for division of an occupancy holding is barred by section 32 of the Agra Tenancy Act." In my opinion the suit is in no sense, virtually or otherwise, a suit to divide a holding. I concur in the judgment of our learned colleague except in one respect only, namely, his attempt to distinguish the case relied on by the court of first appeal. For these reasons I would dismiss the appeal with costs.

GRIFFIN, J.—I have nothing to add to the judgment of my learned brother AIKMAN and I concur in the order proposed by him.

KNOX, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

1900
March 24.

Before Mr. Justice Richards and Mr. Justice Griffin.

JAMNA DAS, (DECREE-HOLDER) *v.* RAMAUTAR PANDE AND OTHERS (JUDGMENT-DEBTORS).*

Act No. IV of 1882 (Transfer of Property Act), section 90—Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage money part of sale consideration—Personal liability of purchaser—Sale of mortgagee rights.

A mortgaged certain property to *B* and sub-mortgaged certain other property by the same deed. He subsequently sold the whole of this property to *C* and left with him the bulk of the sale consideration for redemption of the mortgage and sub-mortgage. *B* obtained a decree for sale of the mortgaged property, but not of the sub-mortgaged property. The proceeds of the sale of the mortgaged property proving insufficient, the decree-holder applied for

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* First Appeal No. 153 of 1907, from a decree of Shah Amjad-ullah, Subordinate Judge of Mirzapur, dated the 16th April 1907.

a decree under section 90 of the Transfer of Property Act against C and the personal representative of A.

Held that by retaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to B, C did not become personally liable and a decree under section 90, Transfer of Property Act, could not be made against him.

THE facts of this case are as follows :—

Musammat Lakhpati Kuar mortgaged certain properties to the appellant Jamna Das for Rs. 40,000. The property motgaged consisted of zamindari property and mortgagee rights in certain zamindari property. On November 24, 1896, Lakhpati Kuar sold the *entire* mortgaged property for Rs. 44,000 to Pandit Ramautar Pande, respondent. Out of this consideration only Rs. 4,000 were paid to the vendor, Lakhpati Kuar, and Rs. 40,000 were left with the vendee, Pandit Ramautar Pande, to pay off the mortgage, but this he never paid to the mortgagee. On February 9th, 1900, the mortgagee brought a suit for sale on his mortgage against both the mortgagor and the vendee, and eventually the High Court, on November 29, 1904, decreed the suit for sale of the zamindari property only. As regards the mortgagee rights the High Court said: "If the rest of the mortgaged property does not prove of sufficient value to satisfy the plaintiff's mortgage in full, it will be open to him to apply in execution for a sale of the mortgagee rights in question. This Court cannot, however, make at present any order for the sale of this portion of the mortgaged property" On November 26, 1905, an order absolute was passed and the zamindari property was sold thereafter. The decree-holder realized the sale proceeds, and a balance of Rs. 25,547-7-0 remained due to him. On January 7, 1907, the decree-holder applied for a decree under section 90, Transfer of Property Act, against both the mortgagor and Pandit Ramautar Pande. The Subordinate Judge disallowed the application as against Pandit Ramautar Pande, holding, on the authority of *Ram Lal* v. *Sil Chand* (1), that a decree under section 90 could be passed only against the mortgagor-defendant. The decree-holder appealed to the High Court.

Dr. *Satish Chandra Banerji* (Babu *Jogendra Nath Chaudri* and Pandit *Moti Lal Nehru* with him), for the appellant,

(1) (1901) I. L. R., 23 All., 459.

1909

JAMNA DAS
v.
RAMAUTAR PANDE.

contended that the case relied on by the lower court was a very different case. There costs were sought to be recovered from a subsequent incumbrancer and the learned Judges limited their decision to the facts of that case. The purchaser merely of the equity of redemption stands on a different footing from the purchaser of the property who takes over the mortgage debt and undertakes to pay it off. Here there was an assumption of the mortgage by Ramautar Pande and he was therefore personally liable to pay the mortgage-money which he had retained *in his* hands. Section 55, sub-section (5), clause (6) of the Transfer of Property Act was referred to.

He further contended that the mortgagee *rights* which had not been sold were undoubtedly mortgaged property over which the mortgagee had still a subsisting charge or *lien*, and the property being in the hands of the vendee, *the balance due* to the mortgagee was legally recoverable from this particular defendant otherwise than out of the property which *had* been sold. Section 90 did not *expressly or* impliedly limit the word 'defendant' to the mortgagor. The mortgagee in his suit had asked for a personal decree against all the defendants. That relief could not be granted to him at that stage. But the High Court then said that if the sale did not satisfy the decree, the mortgagee rights could be proceeded against in execution. That was what the decree-holder was now seeking to do and the equities were entirely in his favour. He cited *In the matter of Act I of* 1879, (1), *Ram Shankar* v. *Ganesh* (2), 1 Jones, *Law of Mortgage,* sections 740, 741, 748, 3 Pomeroy, *Equity Jurisprudence,* sections 1205—6, pp. 2401—6.

Hon'ble Pandit *Sundar Lal,* for the respondent, contended that Ramautar Pande, the transferee, was not personally liable. There was absolutely no covenant between Ramautar Pande and the mortgagee. Under section 90 of the Transfer of *Property* Act, it was the personal liability of the mortgagor which was enforced, as in every mortgage there was a covenant by *the mortgagor* to personally pay the money. By seeking to obtain a personal decree under section 90 against Ramautar Pande, *the decree-holder* was trying to enforce the obligation of Ramautar Pande

(1) (1883) I. L. R., 10 Calc., 92, 93. (2) (1907) I. L. R., 29 All., 385.

1909

Jamna Das
v.
Ramautar
Pande.

Court as a Court of equity should adjust the rights of all the parties once for all.

Munshi *Girdhari Lal Agarwala* was heard in support of an objection on behalf of the personal representative of Lakhpati Kuar, mortgagor, judgment-debtor.

Richards and Griffin, JJ.—This appeal arises out of a suit to enforce a mortgage and an application by the decree-holder for a decree under section 90 of the Transfer of Property Act. On the 6th of June, 1893, a mortgage was executed by Musammat Lakhpati Kuar in favour of Jamna Das. The money was recoverable in 10 years. The mortgage deed contains sundry provisions providing for earlier realisation of the money secured in certain events. The property mortgaged was partly zamindari property and partly mortgagee rights in zamindari property. The principal amount was the sum of Rs. 40,000. On the 24th of November 1896, the mortgagor sold the entire mortgaged property to the defendant, Pandit Ramautar Pande, for the sum of Rs. 44,000 out of which Rs. 4,000 only passed and the balance was left in the hands of Pandit Ramautar Pande for payment of the mortgage-money due to Jamna Das. On the 9th of February 1900, Jamna Das sued for sale of the mortgaged property and for a personal decree in the event of the mortgaged property proving insufficient. Musammat Lakhpati Kuar and Pandit Ramautar Pande were both made defendants. Several defences were raised including the defence that the suit was premature. The case went to the [illegible] Court held that under the terms of clause [illegible] deed the plaintiff's cause of action arose on the [illegible] ber 1896. We particularly mention this matter [illegible] important bearing on the objections filed on behal[illegible] Prasad, the representative of Musammat Lakhpati Kua[illegible] result of the suit was a decree against all the defendants for sale of the zamindari property. The mortgagee rights [illegible] not included in the decree for sale. The Court felt itself bound by the decision in *Mata Din Kasodhan* v. *Kazim Husain*(1). For this reason it reluctantly excluded from the decree for sale so much of the mortgaged property as was represented by the

(1) (18[illegible]) I. L. R., 13 All., 432.

mortgagee rights. In execution of the decree the zamindari property was put up for sale and realised the sum of Rs. 24,547-7. This left, of course, a substantial balance due to the mortgagee, and he accordingly applied for a personal decree against Pandit Ramautar Pande and the representative of Musammat Lakhpati Kuar. In the application the decree-holder says after reciting the facts: "As now remains no property which might be saleable under the High Court decree, dated 29th November 1904, according to the provisions of the Transfer of Property Act, the applicant prays that a decree under section 90 of the Transfer of Property Act may be passed in his favour so that by executing that decree the applicant may recover, with costs and future interest, the amount due to him from the mortgagee right of Musammat Lakhpati Kuar and the property left by her and also from the person and other property of Pandit Ramautar Pande, who, notwithstanding his knowledge of the mortgage made to the applicant, and his express contract as to the payment of the amount of the mortgage due to the applicant, got the mortgaged zamindari property transferred to himself and for several years enjoyed the considerable profits accruing from the mortgaged zamindari property, without paying the amount due to the applicant." In spite of its prolixity of form this is simply an application under section 90 of the Transfer of Property Act, which provides that "when the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant, otherwise than out of the property sold, the court may pass a decree for such sum." The Court has held that the balance is not "legally recoverable from the defendant, Pandit Ramautar Pande, otherwise than out of the property sold." A decree has been made against the representative of Musammat Lakhpati Kuar. The decree holder has appealed against so much of the order of the court below as refuses a personal decree against Pandit Ramautar Pande, and objections have been filed on behalf of the representative of Musammat Lakhpati Kuar. It no doubt appears inequitable that Pandit Ramautar Pande should have taken a transfer of the mortgaged property for Rs. 44,000 on condition of paying Rs. 10,000 in satisfaction of

1909

JAMNA DAS
v.
RAMAUTAR
PANDE.

the mortgage, and that he should now be permitted to retain a large part of the mortgaged property without discharging his obligation. This is however the unfortunate result of the decision we have referred to. Happily the ruling in *Mata Din Kasodhan* v. *Kazim Husain* is no longer acted upon by this Court, see the Full Bench ruling in *Ram Shankar Lal* v. *Ganesh Prasad* (1). The simple question is, can it be said that the balance of the mortgage debt is legally recoverable from Pandit Ramautar Pande otherwise than out of the property sold? The mortgagee rights unfortunately cannot be sold because the decree of the High Court, dated 29th November 1904, was unappealed from and has become final. If the decree-holder is not entitled to a personal decree against Pandit Ramautar Pande, he is without a further remedy in the present suit. It is contended that by retaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to Jamna Das, he became personally liable. In our opinion this contention is not sound. Jamna Das was no party to the contract between Musammat Lakhpati Kuar and Pandit Ramautar Pande. No Indian or English case has been cited to us in which it has been ever held or suggested that the transferee of the equity of redemption in mortgaged property becomes personally liable to the mortgagee. Sections 1205 and 1206 of Pomeroy's "Equity Jurisprudence as administered in the United States of America" have been cited to us. We think it unnecessary to discuss the opinion of the learned author. No English authority is cited for any of the propositions laid down there.

The objections filed on behalf of the representative of Musammat Lakhpati Kuar are to the effect that the application for personal decree is time-barred. We have already mentioned that the High Court in this very suit held that the cause of action arose to the plaintiff on 24th November 1896. This decision on the construction of the mortgage deed is binding on us. The suit in which the decision was given was a suit under the provisions of the Transfer of Property Act, and we must take it that the suit was not only for the sale of the

(1) (1907) I. L. R., 29 All., 385.

1909

JAMNA DAS v. RAMAUTAR PANDE.

mortgaged property but also, in certain events, for decree under section 90. The plaint itself contained a prayer for such relief. We think we cannot go behind the decision of the High Court. We accordingly disallow the objections filed on behalf of the representative of Musammat Lakhpati Kuar with costs. There only remains the question of the costs of the respondent Pandit Ramautar Pande. In the court below the costs of this respondent were thrown on the decree-holder. We think that Pandit Ramautar Pande should bear his own costs in the court below and in this Court. We do not desire to express any strong opinion on the conduct of Ramautar Pande in not keeping his bargain with his vendor, particularly as it is suggested by the learned advocate that he may have some equity against his vendor. The fact, however, remains that he became transferee of the equity of redemption in the mortgaged property stipulating that he would pay the amount of the mortgage to Jamna Das. He did not do so, and in the events which have happened he is holding a substantial portion of the mortgaged property without even discharging the debts due thereon. We dismiss the appeal and direct that the appellant and Pandit Ramautar Pande do bear their own costs in this Court and in the court below. The other respondent on whose behalf the objections were filed must pay the decree-holder's costs.

Appeal dismissed.

1909
March 26

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

NAND RAM (DEFENDANT) v. MANGAL SEN AND ANOTHER (PLAINTIFFS).*

Hindu Law—Partition—Property gifted away to one son to the detriment of another—Share in the property gifted.

When a Hindu father governed by the *Mitakshara* makes a gift of his moveable property to one son to the detriment of the other, not on account of affection for that son, but to punish and disinherit the other son, *held* that the alienation is bad and that in a suit for partition the son can claim a share in the property gifted to the other son.

THIS was a suit for partition of joint family property, which included both moveable and immoveable property. One of the defences set up was that the movable property had been given

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*Second Appeal No. 154 of 1908, from a decree of H. J. Bell, District Judge of Aligarh, dated the 26th of November 1907, modifying a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 2nd of April 1907.

1909

NAND RAM
v.
MANGAL SEN

away by the father of the plaintiff, Mangal Sen, to Nand Ram, a younger brother of Mangal Sen and that the father having full power of disposition over moveables, the gift could not be questioned by the plaintiffs and the moveables given away could not be included in the partition. Both the courts below decreed the plaintiffs' suit in respect of the moveable as well as of the immoveable property. The finding of the lower appellate court in regard to the gift of the moveables was that the gift was "not so much out of affection to one son as based on the motive of dealing retribution to another son." The defendant Nand Ram appealed to the High Court.

Munshi *Gulzari Lal* (with him Babu *Durgacharan Banerjee*) for the appellant, submitted that the father had the power to give away his moveable property to any one of his sons and the other son could not question the alienation. He cited Mayne, *Hindu Law*, pages 435 and 436. *Mitakshara*, Ch. I, section I, paras. 27 and 28. *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (1). *Rayadur Nallatambi Chetti* v. *Rayadur Mukunda Chetti* (2).

Dr. *Satis Chandra Banerji*, for the respondents, cited *Yagnavalkya* Ch. II, verse 121. भूर्या पितामहोपात्ता नियन्धो द्रव्यमेव वा। तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः

[" Inasmuch as the ownership of father and son is co-equal in the acquisitions of the grandfather, whether they be land, any settled income, or moveables, in them the ownership of the father and son is equal."]

He submitted that the original text made no distinction between moveable and immoveable property in respect of the father's power of alienation. The *Mitakshara* did make a distinction but it was open to question if the passage in the *Mitakshara* laid down a mandatory rule of law or was only advisory. The earlier cases on the point, no doubt, were in favour of the appellant but the later cases made no distinction between moveable and immoveable property. Besides, even if the t in the *Mitakshara* might be taken to be mandatory in its the present case did not come within the exceptions eral rule formulated by *Vijnaneswara*, in which e father could alienate moveable property. The

1 Bom., 561. (2) (1868) 3 Mad., H. C. Rep., 455.

finding of the lower court being that the gift was not made out of affection, the gift was illegal and the respondents were entitled to their share in the property given away.

He cited Mayne, *Hindu Law*, para. 335, *Jugmohan Das Mangal Das* v. *Sir Mangal Das Nathubhoy* (1), Ghose, *Hindu Law*, 423, *Raja Ram Tewari* v. *Luchmun Pershad* (2), *Laljeet Singh* v. *Rajcoomar Singh* (3), *Kali Parshad* v. *Ram Charan*, (4).

STANLEY, C. J. and BANERJI, J.—In the suit out of which this appeal has arisen the plaintiff Mangal Sen sued his father Kewal Ram and his minor brother Nand Ram for partition of the joint family property including both moveable and immoveable property. The lower appellate court, as also the court of first instance, decreed the plaintiff's claim. An appeal has been preferred and the only question which has been pressed in argument before us in the appeal is in respect of the order for partition of the moveable property. In the defence, which was filed to the suit the defendants alleged that Kewal Ram gave away the whole of the moveable property of the family to his son Nand Ram and that therefore the plaintiff could not have partition of the moveable property. It has been found by the court below that the moveable property sought to be partitioned was part of the joint family property and that the gift which was made by Kewal Ram to his son Nand Ram was made not from affection but from vindictive motives, namely, to punish the plaintiff on account of alleged misconduct on his part. The lower appellate court finds that the gift was not made out of affection but on the motive of dealing retribution to the plaintiff. We have to see, therefore, whether the father was entitled under the circumstances to make a gift of the moveable property of the family to one son to the exclusion of the other.

The question of the right of a father in a family governed by the *Mitakshara* law, by which the parties here are governed, to dispose of moveable property in favour of one son to the exclusion of other sons, has been considered in a number of cases.

(1) (1886) I. L. R., 10 Bom., 528 at pp. 547, 548 and 514.

(2) (1867) 8 W. R. 15.

(3) (1873) 12 B. L. R., 373.

(4) (1876) I. L. R., 1 All., 159.

1909

NAND RAM v. MANGAL SEN.

We need only refer to a few of the leading authorities on the subject. In the case of *Raja Ram Tewary* v. *Luchmun Pershad* (1), this question was considered and it was decided that according to the *Mitakshara* law a son acquires by birth a right in ancestral property and has a right during his father's lifetime to compel the partition of such property; that the father cannot without the consent of his son alienate such property, except for sufficient cause, and that the son may not only prohibit the father from so doing but may sue to set aside the alienation if made. In delivering the judgment of the Court in that case Sir BARNES PEACOCK, C.J., at p. 20 observes: "It is clear then that the son by birth alone acquires a right in ancestral property and that he has a right during his father's lifetime to compel a partition of such property; that the father cannot without the consent of the son alienate such property except *for sufficient cause*; and that the son may prohibit the *father from so doing*. It has been held that the son has not merely the *right to prohibit* but that he may sue to set aside the alienation if made." No distinction, it will be observed, is here drawn between moveable and immoveable property.

The same question came before the Bombay High Court in the case of *Laksham Dada Naik* v. *Ram Chandra Naik* (2). There, after a review of the authorites, it was held that a Hindu governed by the *Mitakshara* law, who has two sons undivided from him cannot whether or not his act be regarded as a gift or a partition, bequeath the whole, or almost the whole of the ancestral moveable property to one son to the exclusion of the other. In delivering the judgment of the Court in that case, MELVILL, J., observes: "From the above authorities we come to the conclusion that it was not within the power of Dada Naik (*i.e.*, the father) (whether his act be regarded in the light of a gift or of a partition) to bequeath the whole, or almost the whole of the ancestral moveable property *to* one son and virtually to disinherit the other." This case came before their Lordships of the Privy Council on appeal, * and at the hearing it was conceded by the counsel for the parties that

(1) (1867) 8 W. R., 15. (2) (1876) I. L. R., 1 Bom., 561.
* See (1880) 7 I. A., 181: I. L. R., 5 Bom., 48, P. C.—*Ed.*

according to the *Mitakshara* law a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons. The question was also considered in the case of *Jugmohan Das Mangal Das* v. *Sir Mangal Das Nathubhoy* (1), in an appeal from a decision of SCOTT, J., who held that whether the law of the *Mayukha* applies, or the *Mitakshara*, a son is entitled to demand partition of moveable as well as immoveable property in his father's lifetime. The learned Judges who heard the appeal upheld the decision of SCOTT, J, and held that there was no distinction between moveable and immoveable property as regards the right of a son in an undivided family governed by the *Mitakshara* law to partition in the lifetime of the father.

We think that in view of these authorities it is clear that unless a case be brought within the exceptions mentioned in the *Mitakshara* there is no distinction as regards the right to partition between moveable and immoveable property. We therefore must turn to the *Mitakshara* to see whether or not in this case the father was justified in making a gift of the moveable ancestral property to one son so as to exclude from participation therein the other son. We find from a reference to it that property, whether moveable or immoveable, in the paternal or ancestral estate is by birth, but that a father has independent power in the disposal of effects, other than immoveable, for indispensible acts of duty and for the purposes prescribed by texts of law (see chapter I, section I, paragraph 27). The purposes prescribed by texts of law are gift through affection, support of the family, relief from distress, and so forth. If the gift of the moveable property in this case had been made to the defendant Nand Ram through affection, different considerations would arise from those which we have to consider. It is clear from the finding of the lower appellate court that the gift of the moveable property was not made to Nand Ram out of affection but for the purpose of punishing the other son and from vindictive feelings. That is the finding of the lower appellate court which we must accept in second appeal. In view of this finding we cannot say that the gift was one which comes within the purposes mentioned

(1) (1886) I. L. R., 10 Bom., 528

1909

GIRDHARI LAL
v.
KHUSHALI RAM.

decree., Khusali Ram on payment of the amount due to him ceased to have any claim or right to the mortgaged property. Notwithstanding, however, that his mortgage was satisfied he remained in possession and the suit out of which the present appeal has been preferred was then brought by the representatives of the mortgagors to recover possession of the mortgaged property. The court below has dismissed the claim on two grounds, the first being that it is barred by section 583 of the Code of Civil Procedure 1882, and the second that it is barred by the provisions of section 244 of the same Code. Section 583 has obviously no application inasmuch as there was no decree by way of restitution or otherwise passed in an appeal. This section only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in an appeal. As there was no decree passed in an appeal the section does not apply.

As regards section 244 it equally seems to us to have no application. So soon as the decree of Khushali Ram was satisfied by payment of his debt by a *puisne incumbrancer* he ceases to have any interest in the mortgaged property and his decree was satisfied. The question which was raised in this suit was not a question relating to the satisfaction, discharge, or execution of his decree; consequently this section does not bar the suit and the court below was in error in holding that it did.

For these reasons we must allow the appeal. We set aside the decree of the court below and inasmuch as the court below determined the suit upon a preliminary question, and we have overruled its decision upon that question, we remand the suit under the provisions of Order 41, rule 23, to that court, with directions to re-instate it in the file of pending suits under its original number, and dispose of it on the merits.

Appeal allowed.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

1909
April 7.

ALI AHMAD KHAN (OBJECTOR) *v.* BANSI DHAR AND OTHERS (DECREE-HOLDERS).*

Code of Civil Procedure (Act XIV of 1882) sections 278, 283—Execution of decree—Attachment—Objection allowed—Suit by decree-holder decreed—Previous attachment whether subsisting.

Held that the lien of an attaching creditor over the property attached dated from the attachment and was not destroyed or affected by an order of release which was in effect set aside by a subsequent decree, in a regular suit. *Mahomed Warris* v. *Pitambur Sen* (1), *Bonomali* v. *Prosunno* (2), *Ram Chandra* v. *Mudeshwar* (3), *Lalu* v. *Kashi* (4), and *Bank of Upper India* v. *Sheo Prasad* followed (5).

THE material facts will appear from the judgment.

Hon'ble Pandit *Sundar Lal*, and Babu *Lalit Mohan Banerji*, for the appellants.

Mr. *Abdul Raoof*, for the respondents.

KNOX and GRIFFIN, JJ.—This first appeal arises out of execution proceedings connected with a decree held by the respondents obtained by them on the 27th of May 1895 and confirmed by this Court on the 22nd of March 1897.

The respondents, in execution proceedings instituted on the 17th December 1897, attached certain properties with a portion of which we are concerned in the present application. On the objection of Gauri Sahai and Chadammi Lal, the properties with which we are concerned were released from attachment. The decree-holders then instituted a suit under section 283 and obtained a decree in June 1899, declaring that the attached property be brought to sale in execution of their decree. On the 18th January 1901, Musammat Mohan Kuar, one of the judgment-debtors in the original decree, sold the property in suit to one Bholanath. Ali Ahmad the present appellant, then instituted a suit for and obtained a decree for pre-emption over the same property.

The application out of which the appeal has immediately arisen, was instituted on the 13th May 1907, to bring to sale the property attached as far back as the 9th of January 1898.

* First Appeal No. 221 of 1908, from a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 11th of July 1908.

(1) (1874) 21 W. R., 435.
(2) (1896) I. L. R., 23 Calc., 829.
(3) (1906) I. L. R., 33 Calc., 1153.
(4) (1886) I. L. R., 10 Bom., 400.
(5) Weekly Notes, 1897, p. 124.

1909

ALI AHMAD KHAN v. BANSIDHAR.

Ali Ahmad objected saying *inter alia* that the property cannot be sold. His objections were dismissed by the court below and he now comes here in appeal. No argument was addressed to us on the first ground contained in the memorandum of appeal. The second ground, *viz.* that the attachment of 1898 no longer subsists does not commend itself to us. It has been held by the Calcutta High Court in an exactly similar case, *Bonomali Rai* v. *Prosunno Narain Chowdhry and Muzaffar Shah* (1), following *Mahomed Warris* v. *Pitambur Sen* (2), that the case in the Weekly Reporter was a clear authority for the view that "the lien of the attaching creditor dated from the attachment and was not destroyed or affected by the order of release which was in effect set aside by the decree. This point was again considered and these cases were followed in *Ram Chandra Marwari* v. *Mudeshwar Singh* (3). This view is also consistent with that taken by the Bombay High Court in *Lalu Mulji Thakar* v. *Kashi Bai* (4) and *The Bank of Upper India* v. *Sheo Prasad and others* (5). We would note at the same time that from the commencement and up to date there has been an unbroken continuity in the efforts made by the decree-holder to obtain satisfaction of his decree. The original purchaser Bholanath purchased the property at a time when it was subject to an attachment order of a Civil Court and Ali Ahmad can hold no higher position.

This disposes of the remaining pleas taken in appeal. The appeal is dismissed with costs.

Appeal dismissed.

1903
April 16.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

SHEOLAL SINGH (PLAINTIFF) *v.* SUKHDEO SINGH AND OTHERS (RESPONDENTS.)*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section 7—Applicability of—to mortgage executed in* 1894*—Mortgage of sir—Whether mortgagor obtains exproprietary rights.*

R in 1894 made a usufructuary mortgage of his *sir* land to the plaintiff. *B,* the son of R, on the following day executed a *kabuliat* promising to pay rent in respect of that land to the mortgagee. The lower appellate court held that *B*

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* Appeal No. 90 of 1903 under section 10 of the Letters Patent.

(1) (1896) I. L. R., 23 Calc., 829.
(2) (1874) 21 W. R., 435.
(3) (1906) I. L. R., 33 Calc., 1158.
(4) (1886) I. L. R., 10 Bom., 602.
(5) Weekly Notes, 1897, p. 124.

was joint with his father at the time of the mortgage and became an expropriotary tenant and was not liable to pay a higher rent than such tenants were liable to pay. *Held* that the mortgage having been made in 1894, the provisions of the Agra Tenancy Act of 1901 did not apply and the mortgagor acquired no expropriotary rights in respect of the *sir*. *S* was therefore liable to pay rent at the rate mentioned in the *kabuliat*. *Madho Bharti* v. *Barti Singh* (1) followed.

THE facts of this case are as follows:—

One Ram Lal Singh executed a usufructuary mortgage of his zamindari and *sir* lands in favour of the plaintiff Lala Sheo Lal Singh and Rai Madan Makund Lal, on the 30th August 1894. On the next day, that is, on the 31st August 1894, Ram Lal's son executed a *kabuliat* in respect of the *sir* lands on an annual rent of Rs. 112. The son Sukhdeo Singh was living jointly with his father Ram Lal Singh and was interested in that holding jointly with his father. The plaintiff on the 16th August 1906 brought a suit for his share of the rent of holding for the years 1311, 1312 and 1313 F. The defence was that the relation of landlord and tenant did not exist between the parties, and that the *kabuliat* was illegal. The court of first instance gave the plaintiff a decree for the sum claimed. On appeal by the defendant the District Judge modified the decree of the first Court. The plaintiff appealed to the High Court. KARAMAT HUSAIN, J, holding that the *kabuliat* was not binding dismissed the appeal.

The plaintiff appealed under section 10 of the Letters Patent.

Munshi *Kalindi Prasad* (for whom Munshi *Gokul Prasad*) for the appellant, submitted that a zamindar, making a usufructuary mortgage of his *sir* land did not become an expropriotary tenant in respect of it. *Madho Bharti* v. *Barti Singh*, (1).

Babu *Mangal Prasad Bhargava*, for the respondent, replied.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit brought by the plaintiff appellant for arrears of rent against Sukhdeo Singh, respondent. It appears that in 1894 Ram Lal Singh the father of Sukhdeo Singh, executed a usufructuary mortgage of his zamindari and *sir* lands in favour of Sheo Lal, plaintiff, and Rai Madan Makund, defendant. On the day following that of the mortgage Sukhdeo Singh executed a *kabuliat* in favour of the mortgagees in respect of the *sir* lands undertaking

(1) (1891) I. L. R., 13 All., 337.

1909

Sheo Lal Singh v. Sukhdeo Singh.

to pay a rent of Rs. 112 per annum for the occupation of it. As Rai Madan Makund did not join in the suit the plaintiff claimed his share of the rent in accordance with the provisions of sub-section (3) of section 191 of the Agra Tenancy Act. The court of first instance decreed the claim but the lower appellate court modified that decree, holding that the plaintiff was not entitled to the rent mentioned in the *kabuliat* but only to such rent as an exproprietary tenant was liable to pay. This decree has been affirmed by the learned Judge of this Court who heard an appeal from the decision of the lower appellate court. Hence this appeal under the Letters Patent.

The learned Judge of this Court was of opinion that the defendant, who is joint with his father Ram Lal Singh, the mortgagor, had acquired exproprietary rights in regard to the *sir* land under section 7 of Act No. XII of 1881 and that consequently he was not liable to pay any higher rent than that which under that section an exproprietary tenant is liable to pay. This view is opposed to the Full Bench ruling in *Madho Bharti* v. *Barti Singh*(1). In that case it was held that a zamindar who makes a usufructuary mortgage of his zamindari including his *sir* land does not so lose or part with his proprietary rights within the meaning of section 7 of Act No. XII of 1881, as to become an exproprietary tenant of his *sir* land. This ruling does not appear to have been brought to the notice of the learned Judge of this Court. As the usufructuary mortgage in favour of the plaintiff and Rai Madan Makund was made in 1891, the provisions of the Agra Tenancy Act of 1901 do not apply, and the mortgagor acquired no exproprietary rights in regard to the *sir* lands. The defendant who executed a *kabuliat* agreeing to pay rent at the rate of Rs. 112 a year, was liable to pay the rent at that rat[e]. The Court of first instance was therefore right in decreeing th[e] plaintiff's claim. We allow the appeal, set aside the decrees o[f] this Court and of the lower appellate court and restore that o[f] the court of first instance with costs in all courts.

Appeal allowed.

(1) (1894) I. L. R., 16 All., 337.

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji,

1909
April 21.

BULAKI DAS (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).*

Act (Local) No. I of 1900 (Municipalities Act), section 183—Jurisdiction of Civil Courts.

A Municipal Board granted permission to *B* to build a temple. The District Magistrate acting under section 183 of the Municipalities Act made an order cancelling the permission given by the Municipal Board and the Local Government confirmed this order of the District Magistrate. *B* brought a suit for a declaration that he had a right to build the temple.

Held that the suit was not maintainable; *held* further, that the Civil Court had no power to disturb the order of the District Magistrate who acted within his jurisdiction and whose order had been duly confirmed by the Local Government. *Abdul Aziz* v. *Municipal Board of Pilibhit* (1) followed.

THE facts of the case are as follows:—

In the city of Moradabad there is a sarai in which both Hindus and Muhammadans live. In the sarai there is a chabutra with an image of Shiva on it. On the 3rd August 1905 the plaintiff Bulaki Das applied to the Municipal Board, Moradabad for permission to build a temple on the chabutra. The application was granted on the 25th October and the plaintiff commenced building operations. Subsequently some Muhammadan residents of the sarai submitted a petition to the District Magistrate of Moradabad protesting against the erection of the temple. On the 6th February 1906, the District Magistrate, acting under section 183 of the Municipalities Act (No. I of 1900,) cancelled the permission given by the Municipal Board. This order of the District Magistrate was confirmed by the Local Government on the 7th of March 1906. The plaintiff thereupon brought suit for a declaration that the plaintiff had a right to construct the temple. The court of first instance (Subordinate Judge of Moradabad) decreed the suit. The District Judge set aside the decree of the first court and dismissed the suit. The plaintiff appealed to [illegible] High Court.

Bab[illegible] Charan *Banerjee* for the appellant submitted that se[illegible] the Municipalities Act referred to matters falling [illegible] of a Municipality. The remedy sought

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*Second [illegible], from a decree of W. F. Kirton, Additional District Judge [illegible] of August 1907, reversing a decree of Nihal Chandra, [illegible] Moradabad, dated the 15th of April 1907.

(1) [illegible] I. R., 223

1909

BULAKI DAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

by the civil suit was outside its scope. There was no legal bar to the suit. A Civil Court could consider the propriety of an order of the Local Government affecting the legal rights of a party and could give the declaration sought by the suit.

Maulvi Ghulam Mujtaba (with him Mr. *W. Wallach*) for the respondents, submitted that where a special tribunal was constituted to decide certain matters, the ordinary Civil Courts could not interfere. *Abdul Aziz* v. *The Municipal Board of Pilibhit* (1).

STANLEY, C. J., and BANERJI, J.—We think that the decision of the learned Additional Judge of Moradabad, from which this appeal is preferred, is correct. The plaintiff sued for a declaration that he is entitled to build a temple on a site in Moradabad. In a *sarai* in that city there is a *Chabutra* with an image of the god Mahadeo. It is said that there was formerly a *kuchha* temple upon this site which had fallen into ruin and that the plaintiff was desirous of restoring it. He applied to the Municipal Board on the 3rd of August 1905, for permission to build a temple on the *Chabutra* and his application was granted and the building was commenced. Later on, however, some Muhammadan members of the community protested against the building and, in consequence, the District Magistrate on the 6th of February 1906 cancelled the order of the Board in favour of the plaintiff, purporting to act under the provisions of section 183 of the Municipalities Act, Act I of 1900. The order of the District Magistrate was confirmed by the Local Government on the 7th of March 1906. The learned Additional Judge held that it was not open to the plaintiff to maintain his suit in view of the order of the District Magitrate. Hence this appeal.

We think that the view of the law taken by the learned Judge is correct. Section 183 provides that a District Magistrate may by an order in writing suspend within the limits of his district the execution of any order of the Municipal Board and may prohibit the doing within those limits of any act which is about to be done or is being done in pursuance of or under cover of the act, if in his opinion the doing of the act is likely to lead to breach of the peace, or cause injury or inconvenience to the

(1) (1905) 2, A. L. J. R., 222.

public or any class or body of persons. The order of the District Magistrate cancelling the order of the Municipal Board, giving permission to the building of the temple in question, was passed in pursuance of this Act and it was confirmed by an order of the Local Government as provided for by sub-section (2) of section 183. In view of this action of the District Magistrate we are of opinion that the plaintiff is not entitled to maintain a suit for a declaration that he is entitled to build despite the order so passed and confirmed. The principle governing the ruling of a Bench of this Court in the case of *Abdul Aziz* v. *The Municipal Board of Pilibhit* (1) appears to us to be applicable to this case. There it was held that where a Municipal Board acting under its statutory powers ordered the course of a drain which it considered to be prejudicial to health to be diverted, it was held that the Civil Court had no power to disturb the order of the Board inasmuch as it was acting within its statutory powers. So here we think that the Civil Court has no power to disturb the order of the District Magistrate, who acted within his jurisdiction and whose order has been duly confirmed by the Local Government. We dismiss the appeal with two separate sets of costs, one payable to the defendant No 1 and one to other defendants respondents.

Appeal dismissed.

Mr. Justice Banerji and Mr. Justice Tudball

1909 April, 23

KAI[illegible] AND ANOTHER (APPLICANTS) v. SAIYED AHMAD AND ANOTHER (OPPOSITE PARTIES).*

Act No. [illegible] *(Transfer of Property Act), sections 89 and 90.—Two separate suits on two mortgages held by same person—Sale under the decree on the first mortgage—Paid off first mortgage and part of second mortgage—Application under section 90—No decree absolute.*

A person held two mortgages over the same property, brought two separate suits on those mortgages and obtained two decrees. The first decree was made absolute and in execution thereof the decree holder himself purchased the property. The sale-proceeds discharged the decree on the first mortgage in full and the second decree in part. He then applied for a decree under section 90, Transfer of Property Act, to realise the balance due under the second decree. *Held* that no decree under section 90, Transfer of Property

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*Appeal No. 77 of 1903 under section 10 of the Letters Patent.

(1) (1905) 2, A. L. J. R., 221.

1903

KANTA PRASAD v. SAIYED AHMAD.

sold away in execution of a rent decree under the Bengal Tenancy Act, the mortgagee decree-holder could apply for a decree under section 90. He also referred to *Gajadhar Lal* v. *The Alliance Bank of Simla, Ltd.* (1).

BANERJI AND TUDBALL, JJ.—This appeal arises out of an application for a decree under section 90 of the Transfer of Property Act. The appellants held two mortgages over the same property and brought two separate suits on the basis of those mortgages. They obtained two decrees, one on the 13th December 1901, and the other on the 2nd of March 1903. The decree first mentioned was made absolute on the 28th of June 1902, and in execution of it the property comprised in the mortgage was sold and the decree-holders themselves purchased it for Rs. 6,800. The decree upon the first mortgage was satisfied and the surplus of the sale proceeds discharged the amount of the second decree in part. A balance of Rs. 321-10-7 was left unsatisfied and it is for the realisation of this balance that the present application for a decree under section 90 was made.

The court of first instance allowed the application. The lower appellate court dismissed it, and the order of that court was affirmed by the learned Judge of this Court by whom the appeal from the decree of the court below was heard. From the decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent.

Several questions, not free from difficulty, have been raised in the argument before us, but we think the contention of the learned vakil for the respondents, namely, that the decree-holders appellants are not entitled to a decree under section 90 of the Transfer of Property Act inasmuch as they did not obtain an order for sale under section 89 and did not cause the mortgaged property to be sold in pursuance of such order, is well founded. That section provides that if the proceeds of a sale directed by section 89 are insufficient to satisfy the mortgage, a decree may be passed for the balance. In this case no order was obtained under section 89 and no sale took place in pursuance of such an order. It was held in *Muhammad Akbar* v *Munshi Ram* (2), which was followed in the case of *Badri*

(1) (1900) I. L. R., 23 All., 000. (2) Weekly Notes, 1903, p. 223

Das v. *Inayat Khan* (1), that if a sale had taken place under a decree on a prior mortgage, that would not entitle a subsequent mortgagee, who had also obtained a decree for sale to apply for and obtain a decree under section 90. We are bound by these rulings. It cannot be said that in this case the mortgaged property was sold under the decree passed on the second mortgage. The decree-holders made an application in the execution proceedings relating to the first decree asking the court to inform intending purchasers of the existence of the decree on the second mortgage. If the property be regarded as having been sold subject to the second mortgage, the decree-holders had the right to get the property re-sold under the second mortgage. It so happens that they themselves are purchasers under the sale which took place in execution of the decree under the first mortgage. Unless therefore they surrender the property and have it resold in execution of the decree under the second mortgage they cannot ask for a decree under section 90 of the Transfer of Property Act. The other rulings which were referred to in the argument do not touch the point before us and are clearly distinguishable. For the above reasons we are of opinion that the order of the lower appellate court, which has been confirmed by the learned judge of this Court, dismissing the application for execution, is correct though not on the ground on which the order was passed. The case relied upon by the learned Judge of the lower appellate court, namely *Bageshri Dial* v. *Muhammad Naqi* (2) was considered in *Muhammad Akbar* v. *Munshi Ram* to which we have referred above. The question before us did not arise in that case. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1900) I. L. R., 24 All., 401. (2) (1893) I. L. R., 15 All., 231

1909
April 30.

Before Mr. Justice Banerji and Mr. Justice J. Tudball.

SABJU AND OTHERS (APPLICANTS) *v.* DISTRICT JUDGE OF BENARES (OPPOSITE PARTY).*

Act No. VIII of 1890 (Guardian and Wards' Act), section 29—Mortgage of minor judgment-debtor's property—Sanction of District Judge.

The guardian of a minor judgment-debtor, appointed under the Guardian and Wards Act, must obtain the permission of the District Judge under section 29 of the Act to sell or mortgage the property of the minor which is under attachment in execution of a decree even if the Court executing the decree gives leave under section 305 of the Code of Civil Procedure.

THE facts of this case appear from the judgment.

Babu *Harendra Krishna Mukerji*, for the appellant.

Mr. *W. Wallach*, for the respondent.

BANERJI and TUDBALL, JJ.—This is an appeal from an order refusing to grant permission, under section 29 of the Guardian and Wards' Act, to a guardian to mortgage the property of his wards. It appears that a decree was obtained against the minors on a mortgage executed by their father. The guardian of the minors who had obtained a certificate of guardianship made an application to the District Judge, under section 29 of the Guardian and Wards' Act (VIII of 1890), for permission to mortgage the property of the minors for Rs. 800, the value of the property being alleged to be Rs. 1,500. The learned Judge refused to entertain the application on the ground that permission to mortgage should have been first obtained from the court executing the decree. He was of opinion that unless the Court executing the decree gave permission to the applicant to raise the amount of the mortgage decree by private sale or mortgage, the learned District Judge had no power to allow him to deal with the property. He apparently referred to the provisions of section 305 of the Code of Civil Procedure, 1882. We are of opinion that even if section 305 of Act XIV of 1882 applied to a case like this and even if the court executing the decree granted time to the judgment-debtors to raise money by private alienation of the property ordered to be sold, it would still be necessary for the guardian of minor judgment-debtors to obtain the permission of the District Judge, under section 29 of Act VIII of 1890, to m[illegible] of the property.

*First Appeal No. 20 of 1[illegible], District Judge of Benares, dated the 13th of Ja[illegible]

That section forbids the guardian to mortgage or charge the immoveable property of his ward without the previous permission of the District Judge. Therefore, in any case, if the guardian sought to mortgage the property of his ward, the permission of the District Judge was absolutely necessary. As such permission was asked for, the learned District Judge ought to have proceeded under section 29 of Act No. VIII of 1890, to decide whether or not he would grant it. We think the learned Judge was wrong in refusing to entertain the application of the guardian. We accordingly allow the appeal and setting aside the order of the court below send back the case to that court, with directions to restore the appellant's application to the file of pending cases and dispose of it according to law.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Tudball.

1909
April 30.

GHANSHYAM LAL (JUDGMENT-DEBTOR) *v.* RAM NARAIN (DECREE-HOLDER).*

Execution of decree—Conditional decree—Smaller sum payable if payment made within a time fixed by court—Decree of first court fixing time for deposit of money—Decree affirmed by High Court and by Privy Council—Money not paid in within time fixed by first Court—No extension allowed.

A plaintiff claimed the principal sum of money due on a bond with interest at 30 per cent per annum and the decree of the court of first instance directed that if the defendant deposited the money within three months from the date of its decree, he would be liable to pay interest at the rate of 12 per cent. per annum and would be exempted from further liability. This decree was affirmed by the High Court and finally by the Privy Council but the time for payment was not extended. *Held* that the defendant having made default in the payment of the money within the time allowed by the first court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 12 per cent from the date of the Privy Council decree.

THE facts of this case are as follows:—

One Ram Narain brought a suit for Rs. 5,000 principal and Rs. 4,938-12-0, interest, in the court of the Subordinate Judge, Agra, against Ghanshyam Lal. That suit was decreed on the 2nd June 1900, with full costs and future interest at 6 per cent. per annum subject to the condition that if the judgment-debtor paid the principal amount (Rs. 5,000) with full

* First Appeal No. 215 of 1907, from a decree of Jagat Narayan, B.A., Subordinate Judge of Agra, dated the 15th of April 1907.

1903

GHANSHYAM LAL v. RAM NARAIN.

costs and interest at 1 per cent. per month till the date of payment within three months of the date of the decree, he would be exempted from further liability, otherwise he would have to pay the whole amount claimed with costs. The decree was in the following terms:—

> It is ordered and decreed that the plaintiff's claim for Rs. 10,539-12-0 together with the entire costs of the Court and future interest at the rate of Rs. 6 per cent. per annum be decreed on condition that if the defendant will within three months from to-day pay the entire principal amount (Rs. 5,000) and costs and interest at the rate of Re. 1 per cent. per month up to the date of realization, he shall be exempt from further liability, otherwise he shall have to pay (to the plaintiff) the entire amount claimed and costs.

Instead, however, of complying with the decree of the Court within three months, the judgment-debtor appealed to the High Court but his appeal was dismissed. The judgment-debtor then appealed to the Privy Council; but the appeal also failed. When the decree-holder applied for execution of his decree, the judgment-debtor claimed the benefit of the decree of the Subordinate Judge by depositing the principal amount with interest at 1 per cent. per month within three months from the decree of the Privy Council and prayed that satisfaction of the decree be entered. The Court disallowed the judgment-debtor's objection. The judgment-debtor appealed to the High Court.

Mr. *C. Dillon* (with him Munshi *Gulzari Lal*), for the appellant, submitted that the judgment-debtor could pay the principal amount with interest at Re. 1 per cent. per month within three months of the date of the decree of the Privy Council as the original decree and that of the High Court had merged in the decree of the Privy Council. He cited *Nur Ali* v. *Koni Meah* (1), *Luchmun Persad* v. *Kishun Prasad* (2).

Dr. *Satish Chandra Banerji*, for the respondent.

BANERJI and TUDBALL, JJ.—This is a judgment-debtor's appeal and arises out of proceedings relating to the execution of a decree passed by the court of first instance on 2nd June 1900, which was affirmed by the High Court on 19th January 1903, and by the Privy Council on the 16th November 1906. The

(1) (1886) I. L. R., 13 Calc., 13. (2) (1882) I. L. R., 8 Calc., 218.

decree of the court of first instance awarded to the plaintiff the amount claimed by him with costs and future interest, but declared that if the appellant, within three months of the date of the decree, paid the principal sum claimed by the respondent, together with costs and interest at the rate of 12 per cent. per annum he would be exempted from further liability. The plaintiff, it appears, had claimed interest at the rate of 30 per cent. per annum, so that according to the decree of the court of first instance if the judgment-debtor paid the principal amount with interest at 12 per cent. per annum within three months from the date of the decree of that court, *i.e.*, on or before the 2nd September 1900, he would be exempted from further liability under the decree, and would not have to pay interest at the higher rate. He did not make any payment and he now contends that he can pay the principal amount with interest at 12 per cent. per annum within three months from the date of the decree of the Privy Council. It is no doubt true that the decree of the Privy Council is the final decree in the cause of which execution should be taken out, but that decree does not extend the time for payment of the decretal amount. It affirms the decree of the High Court which again affirmed the decree of the court of first instance, including that part of the operative portion of the decree which directs payment of the principal amount with interest at 12 per cent. per annum within three months from 2nd June 1900, the date of the decree. We think the court below was right in holding that the judgment-debtor, having allowed the three months granted to him by the court of first instance to elapse, is not entitled to claim a further period of three months from the date of the decree of the Privy Council. The case of *Nur Ali Chowdhuri* v. *Koni Meah* (1), relied on by the learned counsel for the appellant depended on the terms of section 52 of Bengal Act VIII of 1869 and does not, in our opinion, help the appellant. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1886) I. L. R., 13 Calc., 13.

1909

AMNA BIBI
v.
NAJM-UN-NISSA.

Baksh, have held this estate on the payment of this permanent revenue to Government. Subsequently in the year 1862, the predecessors in title of the present parties brought a suit against the Government claiming the full proprietary right as zamindars over an area of 8,000 odd bighas (part of the estate granted by the *sanad*). That case proceeded on the assumption that Kadir Baksh was the full owner of 3,933 bighas, the balance of the property. The question of the full ownership of this portion of the estate was not in dispute. The plaintiffs in that case obtained from their Lordships of the Privy Council on the 22nd of February 1870, a decree for possession as full proprietors and zamindars of the entire area of 8,000 odd bighas. It also appears that subsequently to this various portions of this estate have been sold by public auction and have also been transferred by co-sharers therein. So that it is clear that the property has all along been treated by the members of this family as an ordinary zamindari holding, subject simply to the payment of Government revenue.

The contention for the appellants is that the property really belongs to the Government and the appellants have only a right to recover from it their pension granted by Government originally to Kadir Baksh, and that therefore the property must be treated as a political pension and not liable to attachment in execution of the decree. A similar question arose in the case of *Lachmi Narain* v. *Makund Singh* (1). It was therein held that the zamindari granted by Government as a reward for services rendered is not a pension and its alienation by the grantee is not prohibited either by Act XXIII of 1871 or by section 266 of the Code of Civil Procedure. At page 621 of the Report the learned Judges held as follows:—"We have no doubt that the word "pension" in section 11 of the Pensions Act and in section 266 of the Code of Civil Procedure implies periodical payments of money by Government to the pensioner in the manner prescribed by section 8 of the Act." The learned Judges also quoted the case of the *Secretary of State for India in Council* v. *Khemchand Jaychand* (2), where the same questions also arose and was decided and in which it was held as follows:—"It follows that in our opinion the word "pension" in section 11 is used in

(1) (1904) I. L. R., 26 All., 617. (2) (1880) I. L. R., 4 Bom. 432.

its ordinary and well-known sense, namely that of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services, or particular merits, or as compensation to dethroned princes, their families and dependents." With this definition we fully concur and it is very difficult to see how the zamindari which was granted under the *sanad* of the 14th of January 1819, can now be deemed a political pension.

Our attention has been called to the decision of a Bench of this court in an unreported case, case no. 32 of 1878, dated the 27th of November 1878. It appears that at the time when this grant was made to Kadir Baksh a similar grant was made to another Pindari chief named Karim Baksh under another *sanad*, practically worded the same as the one in this case. It was held by the learned Judges who decided that case that the property was not liable to attachment. The judgment runs as follows: "It appears that a necessary allowance in the nature of a political pension was originally granted to the ancestor of the judgment-debtor, a Pindari chief Karim Khan. For their necessary allowance a grant of the *taluka* at a given rent was substituted. The Government has from 1846 up to the present time asserted that the grant was a *jagir* escheating to the Government on failure of the *jagirdar's* heirs and which the *jagirdars* for the time being are incompetent to alienate. We may refer to the letter No. 2367 of 1846 from the Secretary to Government to the Secretary, Sudder Board of Revenue, the letter of the Commissioner of the Southern Division to the Sudder Board, dated 6th June 1853, and No. 205 and to the letter No. 221 from Secretary to Sudder Board to the Commissioner of the Benares Division, 17th June, 1853." It does not appear from this judgment that the terms of the *sanad* were at all considered. It is based on certain correspondence which was before the learned judges but which is not before us and which moreover does not relate to the present estate. The circumstances of that case appear to have been somewhat different to those of the case before us. In view of the recent ruling of this Court mentioned above and of the circumstances of this case set forth, we find it impossible to hold that the attached property can in any way be considered a political pension and

1909

AMNA BIBI
v.
NAJM-UN-NISSA.

therefore not liable to attachment and sale. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

P.C.
1909
March 19
May 11

PRIVY COUNCIL.

MANESHAR BAKHSH SINGH (DEFENDANT) *v.* SHADI LAL AND OTHERS (PLAINTIFFS.)

[On Appeal from the Court of the Judicial Commissioners of Oudh Lucknow.]

Contract Act (IX of 1872), section 16 as amended by Act VIII of 1899—Suit on Bond—Debtor and creditor—Disqualified proprietor whose estate was under control of Court of Wards—Exercise by creditor of Undue Influence—Unconscionable Transaction—Compound interest—Onus of proof of Undue Influence.

This was an appeal by the defendant, a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) whose property, on the ground of his indebtedness and consequent inability to manage it, had been placed in charge of the Court of Wards. Whilst it was under their control and without their sanction he executed on 27th January 1898, in favour of the plaintiff, a bond by which he contracted to pay in two years with interest and compound interest with yearly rests, the sum of Rs. 9,950 which was due on a former bond dated 14th September 1889 executed by him for a loan of Rs. 4,000 in favour of the same creditor. No actual money consideration therefore passed at the execution of the bond in suit. The defendant's estates were restored to him in July 1898, and on 25th January 1904 the plaintiff brought a suit for Rs. 32,877 principal and interest due on the bond. The defence was that the bond was obtained by "undue influence", and that it [illegible] onus on [illegible] d to do so [illegible]

Held by the Judicial Committee (reversing the decisions of the Courts in India) following the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), in which the same defendant as in the present case was the borrower that he was (as in that case) placed in such a condition of helplessness that the plaintiff was in a position "to dominate his will" within the meaning of section 16 of [illegible] and that he used [illegible] cree passed for the original sum of Rs. 4,000 with simple interest at 18 per cent. per annum from 14th September 1889 to the date of payment.

Present.—Lord ATKINSON, Lord COLLINS, Lord SHAW, and Sir ARTHUR WILSON.

(1) (1906) I. L. R., 28 All., 570; L. R., 33 I. A., 118.

APPEAL from a judgment and decree (1st May 1905) of the Court of the Judicial Commissioners of Oudh which affirmed a a decree (12th August 1904) of the Subordinate Judge of Bahraich decreeing the respondents' suit.

The suit was brought to recover the principal and interest due on a registered bond, and the questions for determination on this appeal were whether the execution of the bond was obtained by the exercise of undue influence, and whether the transaction was in itself unfair and unconscionable, so as to relieve the appellant from a strict compliance with the provisions of the bond.

The bond was executed by the appellant on 27th January 1896 in favour of the managing members of a joint Hindu family carrying on business as bankers and now represented by the respondents. It was executed in renewal of a previous bond dated 14th September 1889, the consideration of which was an advance of Rs. 4,000, and on which at the time of the execution of the bond in suit there was an amount of Rs. 9,950 due. No actual money consideration therefore passed at the time of execution. The terms were that the sum of Rs. 9,950 was to be paid by the appellant within two years with interest and compound interest at the rate of 18 per cent per annum with yearly rests.

The appellant was the taluqdar of Mallanpur, in the district of Sitapur who, in 1886 being heavily in debt, was in consequence, on his own application declared a disqualified proprietor under the provisions of the Oudh Land Revenue Act, (XVII of 1876) and his estate was taken under the management of the Court of Wards in August 1886 During the time his estate was under control of the Court of Wards he received an allowance of Rs. 1,250 per month, and was also granted a lease of certain villages. Being in want of funds the respondents' firm, among other money lenders made advances to him, and one of the loans so made was under the bond of 14th September 1889 which was executed without the sanction of the Court of Wards. In July 1898, the Court of Wards restored to the appellant the management of his estate, and on 15th January 1904 the respondents instituted the suit out of which their appeal arose to

1909

MANESHAR BAKHSH SINGH v. SHADI LAL.

recover the sum of Rs. 32,877 as payable on the bond of 27th January 1896.

The defence was that the bond was obtained by undue influence, and was "an unconscientious transaction," and issues were raised on those points.

Previous to the hearing of the present case in the courts in India another case against the present defendant by another money lender named Auseri Lal in favour of whom the defendant had executed a bond whilst the estate of Mullanpur was under the management of the Court of Wards, had come before the Courts in Oudh, and on an appeal in the suit the then Judicial Commissioners of Oudh had held on 3rd June 1902 that the defendant was entitled to be relieved from the strict terms on the bond on the grounds that undue influence had been exercised over him in obtaining it, and that it was an "unconscionable bargain". That case, the Judicial Commissioners' judgment in which was afterwards (on 10th May 1906) confirmed by the Judicial Committee of the Privy Council in *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), was distinguished from the present case by the Courts in India, which also expressed dissent from the law as propounded by their predecessors in office.

The Subordinate Judge in the present case found that the defendant had failed to prove the exercise of undue influence over him in the execution of the bond, and there was nothing unusual or unconscionable in the rate of interest. He therefore made a decree in favour of the plaintiffs for the amount claimed with future interest and costs.

The Court of appeal (Mr. A. E. RYVES, First Additional Judicial Commissioner, with whom Mr. W. F. WELLS, Second Additional Judicial Commissioner concurred) after referring to the English and Indian cases which had been cited in argument, and reading clauses 1 and 3 of section 16 of the Contract Act (IX of 1872) as amended by section 2 of Act VI of 1899, proceeded,

"Before the Court can avoid a contract on the ground that it was induced by undue influence it must find on the evidence that one of the parties thereto was in a position to dominate the will of the other and used that position to

(1) (1906) I. L. R., 28 All., 570 : L. R., 33 I. A., 118.

obtain an unfair advantage over the other. The third clause, on which much stress has been laid, seems to be scarcely applicable. However, assuming that it is, it only provides that when one party to a contract is in a position to dominate the will of another and makes a contract with that other person, which *primâ facie* appears to be unconscionable, then the *onus* of proof of its fairness lies on him. It is after all only a matter of evidence in each case. Each case must stand or fall on its own merits. In this case the plaintiff was examined and cross-examined and all the evidence that the defendant put forward was recorded. After examining the evidence of both sides the Court below has upheld the contract and I think rightly."

The Court then examined the whole evidence in the case and agreed with the Subordinate Judge that undue influence had not been proved, and continued:

"The only other point that I need consider is whether the contract was unconscionable. I do not think it was. It was argued on behalf of the appellant that although 18 per cent. compound interest may not be unusual yet in the present case it was excessive. There had been previous loans advanced by the plaintiff to the Raja before his disqualification on the same terms, and in some cases on even higher terms in which besides his personal security landed property had been hypothecated. These debts had not been discharged by the Raja. The Court of Wards had discharged them. Because he had not paid up those debts, it was argued he could not have paid them. If then the plaintiff knew, as he must have known, that even before his disqualification the Raja could not pay off previous debts carrying interest at 18 per cent he most certainly knew that after his disqualification when he had only his monthly "pittance" of Rs 1,250 and what he could make out of the leased villages he would be unable to pay anything towards the discharge of fresh debts, and that, therefore, under the circumstances, knowing the man he was dealing with, it was unconscionable on the part of the plaintiff to insist on so high a rate of interest I see no force in the argument No sane money-lender would lend money to a disqualified proprietor on easier terms after his disqualification than what before disqualification had been accepted as reasonable by both, for his security was immeasurably reduced and the chance of recovering his money rendered very remote The previous dealings between the parties, when there is no suggestion of any undue influence, and experience in other cases abundantly proves that the rate of interest charged was under the circumstances by no means excessive."

On these grounds the decree of the Subordinate Judge was affirmed and the appeal dismissed with costs.

Leave to appeal to His Majesty in Council was refused by the Court of the Judicial Commissioner, but special leave to appeal was granted to the appellant by order in Council, dated 1st March 1907.

On this appeal,

1909

MANESHAR BAKHSH SINGH v. SHADI LAL.

De Gruyther, K.C., and *S. A. Kyffin*, for the appellant contended that on the true construction of section 16 of the Contract Act (IX of 1872) and the facts proved by the evidence the appellant was entitled to be relieved from strict compliance with the provisions of the bond in suit; and it was pointed out that the judgments of the courts in India were opposed to the decision of their Lordships of the Privy Council in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1) which it was submitted governed the present case unless it could be distinguished by the respondents, or unless the burden of proof should be held to be on the appellant.

Ross for the respondents contended that the courts below had distinguished the present case from the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1), and had arrived at concurrent holdings on the facts of this case. The main facts on which the cases differed were that in the present case the intention of the parties was that the greater portion of the Rs. 4,000 principal of the bond of 14th September 1889 should be paid by means of the income of the villages of which the appellant had the lease; that the sums of Rs. 500 had actually been paid to the ... the bond for Rs. 4,000; that ... aid on the bond in suit though after the release of the appellant's estate from the Court of Wards; that the respondents used to make frequent demands for their money; and that the bond in suit fixed two years for payment of the money showing that the parties intended the debt to be paid soon. In the case of *Dhanipal Das* the bond was for a term of seven years; and in a passage from the judgment of the Judicial Commissioners in that case they said, "It is clear that both parties knew that the simple interest would not be paid and that compound interest would accrue due and that the principal amount would not be paid, while the estate of the defendant was in the charge of the Court of Wards, and that neither of them intended that anything should be paid while the estate was in the charge of the Court. There is a reasonable presumption that the improvidence of the defendant

(1) (1906) I. L. R., 28 All., 570 ; L. R., 33 I. A., 118.

and his need, or imaginary need of money, placed him in the plaintiff's power and that the plaintiff took advantage of such power to induce the defendant to make promises which there was no intention that he should fulfil until an event, the time of the happening of which was uncertain, happened, and which promises as long as they were not fulfilled, gave rise to heavy pecuniary liabilities. The plaintiff did not enter into the transactions as a fair matter of business, but in the hope that the event would not happen, and that the defendant's promises would remain unfulfilled. His sole object was that the defendant might become heavily indebted to him before the event happened he looking to the happening of the event to realize the amount of the debt."

In the present case the Judicial Commissioners say of that passage, "Now in this case the evidence, which I shall examine, could not, I think, support similar findings. That in itself is enough to distinguish the two cases. The plaintiff or rather his deceased partner lived in Bahraich. He had money dealings previously with the Raja. Those debts were paid off when the estate was brought under the Court of Wards. This fact, it seems to me, proves conclusively that the Raja himself could have equally well paid them off if he had chosen to do so." In this case also, on the findings of both the courts below there was no unfair advantage taken of the appellant. It was submitted that the Judicial Commissioners had rightly held that the bond in suit was not the result of the exercise of "undue influence" on the part of the creditors, and that the terms of the bond were not in themselves unfair or unconscionable.

De Gruyther, K. C., replied.

1909, *May 11th* :—The judgment of their Lordships was delivered by LORD COLLINS:—

This is an appeal by the defendant, a disqualified proprietor under the provisions of the Oudh Land Revenue Act 1876, against the judgment of the Court of the Judicial Commissioner of Oudh, affirming a decision of the Subordinate Judge of Bahraich in favour of the plaintiffs suing to recover money secured by a bond dated the 27th January 1896 whereby the defendant contracted to pay within two years to the plaintiffs

1909

MANESHAR BAKHSH SINGH v. SHADI LAL.

(or their predecessors in title) a sum of Rs. 9,950 with interest and compound interest at the rate of Rs 18 per cent. per annum, with yearly rests. There was practically no consideration paid at the time of the execution of the bond, which was given in renewal of a previous one dated the 14th September 1889, the consideration for which was an advance of Rs. 4,000. The Raja was a person of extravagant habits, and when his estate was placed under the Court of Wards, as it was, at his own instance, in August 1886, his debts were said to have amounted to about seven or eight lakhs of rupees. The bond in suit was given without the knowledge or consent of the Court after his estate had been taken over. The defence was that, in the circumstances, the bond ought to be treated as given under undue influence and as unconscionable. It was assumed both in the Court of first instance and in the Court of the Judicial Commissioner that the onus of proving undue influence was upon the appellant. In this respect the said decisions are directly opposed to that of this Board in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh*, the present appellant (1), decided in respect of another loan by the then plaintiff (one Auseri Lal) to the [illegible] disqualification. In that case— [illegible] identical in its facts with that under appeal, except that the moneylender was a different person, though the borrower was the same—their Lordships in referring to the evidence, say (at p. 126 of 33 I. A.):—

"The fair result . . . is that the respondent, through his improvidence, was in urgent need of money, and owing to his estate being under the care of the Court of Wards, he was in a helpless position. There was no fraud in the matter, and no pressure was put upon the respondent by Auseri Lal . . . to induce him to accept the conditions offered to him . . . But it must be taken that the respondent was compelled by his circumstances to accept the terms which were offered to him . . . Their Lordships are of opinion that, although the respondent was left free to contract debt, yet he was under a peculiar disability, and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some 50 years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was 'in a position to dominate the will' of the respondent within the meaning of the amended section 16 of the Indian Contract Act

(1) (1906) I. L. R., 28 All., 570; L. R. 33 I. A., 118.

1909

MANESHAR BAKHSH SINGH v. SHADILAL.

Commissioner of Oudh and the decree of the Court of the Subordinate Judge of Bahraich be discharged, and that instead thereof it be ordered that the bond of the 27th January 1896 be set aside and that the appellant pay to the respondents the sum of Rs. 4,000 with simple interest at the rate of 18 per cent. a year from the 14th September 1889 to the date of payment, with proportionate costs in both Courts below on the amount decreed, to be settled by the Judicial Commissioner in case of difference, and that as to the rest each party bear his own costs.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Barrow, Rogers, & Nevill.*

J. V. W.

P. C.
1909
March 24, 25
May 11

MAHESHAR PARSHAD AND OTHERS (DEFENDANTS) v. MUHAMMAD EWAZ ALI KHAN (PLAINTIFF)

and

MUHAMMAD EWAZ ALI KHAN (DEFENDANT) v. MAHESHAR PARSHAD* AND OTHERS (PLAINTIFFS).

Appeal and Cross appeal consolidated.

[On appeal from the Court of the Judicial Commissioners of Oudh, at Lucknow; and from the Board of Revenue of the United Provinces of Agra and Oudh, and the Court of the Commissioner of the Fyzabad Division.]

Oudh Sub-Settlement Act (XXVI of 1866)—Construction of Rules in schedule to Act—Rules 2, 3 and 13—Revision of decree granting under-proprietary rights, made before passing of Act—Jurisdiction of Financial Commissioner—Construction of Lease—Right of taluqdar to ejectment of lessee on expiry of lease—Oudh Rent Act (XXII of 1886).

The history of the Oudh Sub-Settlement Act (XXVI of 1866) together with its provisions and the rules in the schedule attached to it show that the object and purpose with which it was passed were to revise and correct what had been hastily and imperfectly or loosely done, and to secure that no person should enjoy under-proprietary rights who could not establish his claim in the manner prescribed by those rules.

"Claims which have been disposed of otherwise than in accordance with these rules," in rule 13, mean claims which have not been supported by the proofs prescribed by, amongst other provisions, rules 2 and 3, that is proof that the claimant possesses an under-proprietary right in the lands of which sub-settlement is claimed; that such right has been kept alive over the whole area

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* *Present*:—Lord ATKINSON, Lord COLLINS, Lord GORELL and Sir ARTHUR WILSON.

1909

MAHESHAR PARSHAD *v.* MUHAMMAD EWAZ ALI KHAN.

appeal (7 of 1908) in which the Taluqdar was the appellant, and Maheshar Parshad and his co-sharers respondents the decree was to the effect that the Shukuls were in possession under a perpetual lease and were not liable to be ejected in the proceedings instituted by the Taluqdar under the Rent Act to obtain possession of the village.

The litigation arose as follows:—In 1864 Bhairon Shukul the ancestor of Maheshar Parshad and his co-sharers instituted proceedings in the Court of the Settlement Assistant Commissioner against Rani Sadha Bibi the predecessor in the title of Muhammad Ewaz Ali Khan alleging that he was in possession and occupation of the village by hereditary right and praying that a settlement of the under-proprietary right be made with him; and on 15th March 1864 the Assistant Commissioner Mr. W. E. FORBES decided in favour of *Bhairon Shukul* as follows:—

"After a careful consideration of all the evidence and the facts brought to light hereby, in this case, I have come to the conclusion that plaintiff's claim [illegible] the issue [illegible] ding lease [illegible]. I therefore decree permanent lease of Mauza Gadaria Dih, with Hasanpur, in favour of plaintiff Bhairon Shukul, and that he pay *malikana* to defendant at the rate of 25 per cent. on the revised *jama*."

That judgment was affirmed by the Settlement Commissioner, the Chief Commissioner, and Mr. DAVIS the Financial Commissioner.

The Oudh Sub-Settlement Act (XXVI of 1866) was passed in October of that year, and on 17th January 1867 the Taluqdar (Sadha Bibi) applied to the then Financial Commissioner Colonel Barrow for a review of the former Financial Commissioner's judgment and the case was "remanded to the Settlement Court for reinvestigation under the new rules," that is, the rules in the Sub-Settlement Act. On 4th May the Assistant Settlement Officer held that Bhairon Shukul had proved "his under-proprietary right together with the fact that such right has been kept alive over the whole area claimed within the period of limitation." That decision was affirmed by the Commissioner of the Rai Bareli Division on 16th May 1868.

The taluqdar appealed to the Financial Commissioner, Colonel BARROW who, on 21st August 1868, remanded the case for further trial with the remarks that "under the old rules, I may observe that the question of former proprietary right was not laid down strictly as one of the issues requiring positive proof, but under the existing law the claimant has to give legal proof on this point, and it must be placed beyond a doubt that an under-proprietary right does exist."

The issue for trial was, "Is claimant to sub-settlement the old proprietor and had he proprietary possession when the village was incorporated in the taluq, or is he as stated only the Taluqdar's mahajan ?"

The case came in that issue for trial before the Deputy Commissioner of Sultanpur who, on 18th December 1868, said :

"My opinion is required on one point only, *i.e.*, whether plaintiff represents the original proprietors who held the village when it was incorporated in the taluqa. This issue, according to the Financial Commissioner's judgment, must be legally proved. Proof is derived from evidence which amounts to conviction. The evidence here is, as usual, documentary and oral. The documentary evidence of the kanungos is for the most part, manifestly untrustworthy. More especially that which is produced by the kanungos who appear for the plaintiff. Their papers were produced as original, ancient documents, but on examination were admitted to be copies only. The verbal evidence of these kanungos being admittedly based on these papers is equally untrustworthy . . . . . I cannot find from the evidence that the Upadhya Brahmans, from whom the Shukul, plaintiff, claims to have inherited, were in proprietary possession, my finding is, therefore, adverse to the plaintiff. At the same time it certainly appears to me that the plaintiff and his forefathers have been in sub-proprietary possession. It has not been shewn that money-lending had anything to do with this tenure. Taking Act XXVI as it stands, free from official interpretation, the plaintiff has proved his case and should have a Sub-settlement. But if the Chief Court be of opinion that this cannot be decreed, there is nothing more to be said. The Agent for appellant expresses himself willing to come to terms."

The claim was finally disposed of by the order of Colonel BARROW, the Financial Commissioner, on 6th January 1869 in the following terms :—

"The provisions of the Sub-Settlement Act have not been complied with but as the special appellants' agent is willing to compromise the suit, there need be no further difficulty in disposing of the case. I will only add that as the original proprietor's title has not been proved, the plaintiffs are in no way entitled to sub-settlement which actually restores them under our rules to proprietary possession, and makes the Talukdar who has been half-a-century in possession the mere recipient of malikana. I decree a farming lease to plaintiff, he paying the

1909

Maheshar Parshad
v.
Muhammad Ewaz Ali Khan.

Government demand, plus 25 per cent. to the Taluqdar for a period of 30 years."

One of the questions raised in these appeals was as to the meaning of that order, the Taluqdar contending that the lease was granted for the period of thirty years, while the Shukuls contended that the order gave them a permanent hereditable lease, the rent of which alone was fixed for thirty years.

On 5th April 1869 Bhairon Parshad applied for a review of the above order on the ground that he had only been granted a lease of the village for thirty years whereas he was *entitled to a* permanent lease, but his application was rejected by the Financial Commissioner on 10th April 1869. *On 12th July* 1869 Sadha Bibi also applied for a review of the order of 6th January 1869 on the ground that Bhairon Parshad had *no right* at all, and should not have been granted a lease even for *30 years:* that application was also rejected by the *Financial* Commissioner.

The thirty years provided by the lease *to* Bhairon Parshad expired on 6th January 1899. The Taluqdar was anxious to recover possession of the village and in October 1894 served a notice of ejectment under the provisions of the Oudh Rent Act (XXII of 1886). Thereupon a suit was *instituted* on 16th November 1894 in the Court *of* the Assistant Commissioner *of* Sultanpur by the Shukuls against the *Taluqdar* which was decided on 16th March 1895, the Assistant Commissioner holding that tenancy terminated on 6th January 1899 and cancelling the notice as being premature.

In November 1897 a fresh notice of ejectment was issued which was also contested by suit in which the judgment was delivered on 29th January 1898 when the Deputy Commissioner of Sultanpur (Mr. W. F. Brownrigg) cancelled the notice on the ground that the lessees acquired a permanent hereditable lease under the order of 6th January 1869. On appeal *by* the Taluqdar the Court of the Commissioner of Fyzabad on 12th July 1898 refused as a Revenue Court to decide the *nature and* extent of the Shukuls interest in the village, and cancelled *the* notice of ejectment as being still premature.

The Taluqdar in November 1898, issued a third notice of ejectment, and in a suit to cancel it the *Deputy* Commissioner of

1909

MAHESHAR PARSHAD
v.
MUHAMMAD EWAZ ALI KHAN.

Sultanpur on 4th February 1899 made an order granting ejectment on the ground that the lease was for a period of thirty years which had expired on 6th January 1899. This order was, on an appeal to the Commissioner of Fyzabad set aside on 6th May 1899 on the ground that the Shukuls could not be ejected until the Taluqdar had obtained from a Civil Court a declaration of the true construction of the Financial Commissioner's order dated 6th January 1869. On a further appeal by the Taluqdar the Board of Revenue affirmed the judgment of the Commissioner of Fyzabad.

In consequence of these adverse orders the Taluqdar on 11th January 1900, instituted in the Court of the Subordinate Judge of Sultanpur the suit against the Shukuls out of which appeal 39 of 1906 arose. The plaint stated that the defendants had no right to the village after the expiry of thirty years from the date of the Financial Commissioner's decree, and prayed for a decree for possession, and in the alternative for a declaration that the defendants were entitled to no right, either as under-proprietors, or as intermediate holders or to any rights superior to those of mere tenants of the village.

The various pleas raised in defence to the suit appear in the issues which so far as material were as follows:—

(1) Is this suit cognizable by the Civil Court?

(2) Is the present claim for possession and declaration not maintainable?

(3) Is the suit time-barred?

(5) Was the decree of the 6th January 1869, passed without jurisdiction and is it not valid and binding on defendants?

(5) (*a*). Have the defendants proprietary or under-proprietary right in the village in suit?

(6) Does the thirty years' period mentioned in the decree of the 6th January 1869, relate to the term of the lease itself or merely to the amount of the rent fixed thereby to be paid by the defendants to the plaintiff?

(7) If it relates to the terms of the lease itself:—

(*a*) May the defendants legally claim to be entitled to remain in possession of the whole or a part of the village even now after the expiry of the thirty years period?

1909

MAHESHAR PARSHAD
v.
MUHAMMAD EWAZ ALI KHAN.

(b) May the defendants claim under-proprietary right in all or any of the property specified in paragraph 20th of the written statement, and have they really any such right thereto?

(10) What relief if any is plaintiff entitled to and against which of the defendants?

The Subordinate Judge decided the first issue as a preliminary issue, and holding that the Civil Courts had no jurisdiction made a decree dismissing the suit with costs. On appeal the Court of the Judicial Commissioner reversed that decree and remanded the case to the Subordinate Judge for trial on the merits. In remanding it the Judicial Commissioners observed:

"The Subordinate Judge was right in holding that if the defendants became tenants for a period of thirty years only under the decree of the 6th January 1869, a suit to eject them on the expiration of such period under the terms of the decree must be brought in a Revenue Court, and a Civil Court cannot entertain such a suit. But the Subordinate Judge has wrongly decided that the jurisdiction of the Civil Courts to declare that the defendants are not the under-proprietors of the village is taken away by section 53 of the Oudh Rent Act. ....

The suit then, on 1st December 1903, came on for disposal on the remaining issues, which the Subordinate Judge finally decided on 10th February 1904. He held that the suit was not barred by limitation; that the decree of 6th January 1869 was not passed without jurisdiction, and was valid and binding on the defendants; and that the defendants had no proprietary or under-proprietary rights in the village in suit. He gave no finding on the 6th issue or the first part of the 7th being of opinion, with reference to the judgment of the Judicial Commissioners that the points there raised (as to the construction of the decree of 6th January 1869) should be determined by the Revenue, and not the Civil Courts. On the second part of the 7th issue he held that the defendants could claim the rights therein referred to but had not established them by proof. On the 10th issue he said "As to this issue it is sufficient to say, as has been held by the Judicial Commissioner of Oudh that the Civil Courts cannot eject the defendants, if the defendants were held to be tenants, but the

Civil Courts have every jurisdiction to decide whether the defendants were or were not the under-proprietors, therefore it is clear that the only relief which under the circumstances of the case can be given to the plaintiff, is the declaration of defendants having no under-proprietary right in the village or in any part thereof."

The result was a decree in those terms for the plaintiff, the Taluqdar.

From that decree the Shukuls appealed to the Court of the Judicial Commissioner of Oudh, and the Taluqdar filed objections under section 561 of the Civil Procedure Code to the effect that the Subordinate Judge ought not to have declined to interpret the decree of 6th January 1869 as to whether the period named therein referred to the fixing of the rent or to the duration of the lease, but these objections were subsequently withdrawn.

The Court of the Judicial Commissioner on 13th December 1904 held that the suit was not barred by limitation, and that the Taluqdar had established his right to the declaration sued for. The Judicial Commissioner (MR. ROSS SCOTT) said :

"In order to establish under-proprietary rights in any land it must be proved among other matters that a former proprietor has retained within the period of limitation either by himself or by some other person or persons from whom he has inherited, possession of the land, which by virtue of his proprietary right he held as *sir* or *nankar*, when he was in proprietary possession. As the ancestors of the appellants were never proprietors they can therefore have no under-proprietary rights in any part of the village. We were asked to hold that the finding of the Financial Commissioner was without jurisdiction as it was not shown that the claims of the persons whom the appellants represent had been disposed of by the Settlement Officer otherwise than in accordance with the rules contained in the Oudh Sub-Settlement Act, but we declined to consider the question as the Financial Commissioner was the final Court of appeal at the time, and it was for him to decide whether he had jurisdiction or not. In my opinion it was altogether unnecessary for the respondent to institute the present suit for a declaration that the appellants are not under-proprietors of whole or any part of the village, as the question was finally decided by the decision of a competent Court, which found that their ancestors had never been proprietors of the village. Their ancestor was no doubt recorded at the former Settlement as holding certain plots as *sir* or *khudkasht*, but as they did not hold them by virtue of any former proprietary right, the appellants are not under-proprietors of any of these plots. It has not been contended before us that the respondent or his predecessors have ever admitted that the appellants are under-proprietors."

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

"For the reasons stated above I would hold that the suit is not barred by limitation and that the appellants are not under-proprietors of the village or any part of it, and would dismiss the appeal with costs.

"I may add that this Court in its judgment remanding the case, appears to have overlooked the main object of the plaintiffs' suit, which was to obtain a declaration that the defendants have no right, under the decree of the 6th January 1869, to remain in possession of the village. It directed the Subordinate Judge to decide 'whether the relation of landlord and tenant existed between the parties or whether the defendants were under-proprietors, and no doubt he has in consequence refused to interpret the decree. The result seems to be that the plaintiff has obtained no declaration, such as the Revenue Courts held that it was necessary for him to obtain, but as the objections of the respondents have been withdrawn, it is impossible for us to decide whether the defendants have a right to remain in possession after the expiry of the thirty years or not."

The Additional Judicial Commissioner (MR. W. F. WELLS) delivered a judgment in which he agreed with the Judicial Commissioner, and at the end of the judgment he said of the Shukuls:

"They have, therefore, no *under-proprietary* rights of any kind left. The way is now clear for the Revenue Courts to determine whether the lease decreed [illegible]"

The appeal was accordingly dismissed, and the decision of the Subordinate Judge affirmed.

Thereupon the Taluqdar issued a fresh notice of ejectment under the Rent Act (XXII of 1886) to contest which under section 108 (8) of the Rent Act the Shukuls, on 12th December 1905, instituted the suit out of which the cross-appeal (7 of 1908) arose. They claimed that in any case they were entitled to the sir lands (the subject of issue 7 (*b*)) and that in no case could they be ejected without compensation for improvements (paragraph 7 (*f*) of the plaint).

The Deputy Commissioner of Sultanpur (MR. D. L. JOHNSTON) in giving judgment on 9th May 1906 said:

"The plaintiffs' contention is that the Financial Commissioner gave a farming lease in perpetuity subject to revision of terms at settlement. The defendant's contention is that the lease was for thirty years only and now that it has expired, the plaintiffs are ordinary tenants and can be ejected by notice. In one of his previous attempts to eject by notice the taluqdar counted the thirty years from the commencement of the term of Settlement ([illegible] A. D.). Later as the courts refused to count from earlier than 1869, he accepted their view, but his original attitude confirms the view of Mr. Prowse set forth in his judgment, dated [illegible] January [illegible], (plaintiffs' No. 47) that the Financial Commissioner refused

under-proprietary rights which were almost as valuable as proprietorship, but gave a perpetual farming lease, adding the term of thirty years to allow of alteration of the rent at the revision of Settlement and that the term ran from the commencement of Settlement. Following Mr. Brownrigg I am of opinion that the plaintiffs hold under a perpetual farming lease, the terms of which are liable to alteration at the Revision of Settlement but were not altered at the last Revision."

In the result the notice of ejectment was cancelled with costs.

The Taluqdar appealed to the Commissioner of the Fyzabad Division (MR. R. E. HAMBLIN) who said in his judgment on 13th August 1906:

"The question argued is whether the farming lease given by Colonel Barrow in 1869 is only for thirty years or is perpetual. Stress is laid on the application by plaintiff for review on the ground that he ought to be given a perpetual lease, and on Colonel Barrow's order on this rejecting it. Considering what has been seen in this lengthy litigation of Colonel Barrow's procedure, I am unable to agree that his order 'rejected' necessarily means that he accepted plaintiff's view that the lease was one for thirty years. The application was also one for further inquiry and all the value that I am willing to give the word 'rejected' is that Colonel Barrow considered that he had finally settled the question. I agree with what Mr. Brownrigg has said in his judgment of the 29th January 1898 (and in his supplementary note) as to the value of the lease. In my opinion Colonel Barrow considered the question before him was whether plaintiff should be given a sub-settlement, or not, and as he decided this adversely to plaintiff, and as he believed the defendant was willing to come to terms he fixed himself the terms he considered suitable. He gave a perpetual lease fixed as to the rent for thirty years, which he probably meant to mean the term of settlement. The Settlement Department has so considered it for whilst holding that the rent should be changed at last settlement and changing it, yet that department and the Revenue Courts have held the opinion that the period of thirty years in the lease began from the year 1869 in which Colonel Barrow gave his order."

The appeal was consequently dismissed and the order of the Deputy Commissioner affirmed. An appeal to the Board of Revenue was also on 2nd January 1907 dismissed on the grounds that the decision appealed from was final.

From the decision of the Court of the Judicial Commissioner of 13th December 1904 the Shukuls appealed to His Majesty in Council in the ordinary course (appeal 39 of 1906); and by an order in Council made on 2nd November 1907 special leave to appeal was granted to the Taluqdar to appeal from the order of the Commissioner of Fyzabad of 13th August 1906, and the order of the Board of Revenue rejecting the appeal therefrom,

1909

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

Kenworthy Brown for the appellants in the appeal and respondents in the cross-appeal contended, as to the suit brought by the Taluqdar that it was barred by limitation, and reference was made to *Imdad Husain* v. *Aziz-un-nisa* (1) per Lord Hobhouse; *Widow of Shankur Sahai* v. *Rajah Kashee Pershad* (2); *Drig Bijai Singh* v. *Gopal Datt Pandey* (3); Oudh Revenue Courts (Act XVI of 1865), sections 2 and 5; Act XIII of 1866 section 1 and, as to the effect of confiscation on under-proprietary rights, *Thakurani Sookraj Koowar* v. *Government* (4).

It was also contended that the decree of 6th January 1869 was passed without jurisdiction because rule 13 under the Oudh Sub-settlement Act (XXVI of 1866) did not authorise the Financial Commissioner to revise the decision of the Settlement Officer of 15th March 1864 which had declared the predecessor in title of the appellants to be under-proprietors of the village in suit and had given them a permanent lease of it, and his decision had been affirmed by the Settlement Commissioner, and the Chief Commissioner. Even if the status of their predecessor in title was liable to be altered by inquiry and revision under the rules in Act XXVI of 1866, he would not, merely because he was unable to give the precise proof required by rules 2 and 3 under that Act, necessarily be left in a position which rendered him subject to eviction. On the construction of the decree of 6th January 1869 it was submitted that the expression "for thirty years," did not refer to the duration of the lease, which was meant to be permanent, but referred only to the rent which was intended to remain unaltered for that period. There was nothing in the decree as to ejectment after the expiry of the thirty years. The decree of the Settlement Officers of 15th March 1864 decided that the predecessor in title of the appellants was entitled to a "permanent lease" on the ground that he had been holding for a long term of years in virtue of former proprietary right," which showed what his status was considered to be on the evidence then produced. The decree of the Financial Commissioner did not deprive Bhairon Shukul of any rights he then had. If it only granted him a lease of the land for thirty years, then,

(1) (1895) I. L. R., 23 Calc., 453 (472); L. R., 21 I. A., 8 ([illegible]).
(2) (1873) L. R. I. A. Sup. Vol. 233.
(3) (1879) I. L. R., 6 Calc., 219 ([illegible]); L. R., 7 I. A. ([illegible]).
(4) (1871) 14 Moore's I. A. 112 ([illegible]).

at the expiry of that period, the appellants as his successors in title were still entitled to the same rights as Bhairon Shukul had before the lease was granted. The Judicial Commissioners were wrong, therefore, in holding that the decree of the Financial Commissioner amounted to a declaration that the predecessor in title of the appellants had no under-proprietary right and that consequently the appellants had none. The proper construction of that decree was that put upon it by the Deputy Commissioner of Sultanpur, and the Commissioner of the Fyzabad Division held that it granted a perpetual lease to Bhairon Shukul, and that decision, it was submitted, was correct, and the respondents in the cross-appeal could not be ejected. Reference was made to the former Oudh Rent Act (XIX of 1868); the Oudh Rent Act (XXII of 1886) section 3, clause 10, as to the meaning of "under-proprietary right," and sections, 52, 53, 55 and 108 as to the ejectment of tenants; and Syke's Compendium of the law of Oudh, pages 136, 148.

De Gruyther K. C. and *B. Dube* for the respondent in the appeal, and the appellants in the cross-appeal, contended that in the true construction of the decree of 6th January 1869 a farming lease was granted to Bhairon Shukul for thirty years, and that period having expired in 1899, his successors in title were liable to ejectment. The temporary settlement of all revenue paying land in Oudh was made for a term of thirty years, and that was the reason for its being put into the lease. The Financial Commissioner had ample jurisdiction to revise the decisions as to the claim of the ancestor of the Shukuls to under-proprietary rights in the village, which were given before the passing of Act XXVI of 1866, under rule 13 in that Act; and it was for Bhairon Shukul to prove under rules 2 and 3 that he or his predecessors had previously possessed under-proprietary rights in the village. In his remarks on 21st August 1868 Colonel Barrow, the Financial Commissioner observed, "Under the existing law the claimant has to give legal proof on this point, and it must be placed beyond doubt that an under-proprietary right does exist." Reference to the subsequent proceedings before the Deputy Commissioner on the 18th December 1868 showed that no such right was proved. Consequently the Financial Commissioner

1903

MAHESHAR PARSHAD v. MUHAMMAD EWAZ ALI KHAN.

Kenworthy Brown for the appellants in the appeal and respondents in the cross-appeal contended, as to the suit brought by the Taluqdar that it was barred by limitation, and reference was made to *Imdad Husain* v. *Aziz-un-nisa* (1) per Lord Hobhouse; *Widow of Shankur Sahai* v. *Rajah Kashee Pershad* (2); *Drig Bijai Singh* v. *Gopal Datt Pandey* (3); Oudh Revenue Courts (Act XVI of 1865), sections 2 and 5; Act XIII of 1866 section 1 and, as to the effect of confiscation on under-proprietary rights, *Thakurani Sookraj Koowar* v. *Government* (4).

It was also contended that the decree of 6th January 1869 was passed without jurisdiction because rule 13 under the Oudh Sub-settlement Act (XXVI of 1866) did not authorise the Financial Commissioner to revise the decision of the Settlement Officer of 15th March 1864 which had declared the predecessor in title of the appellants to be under-proprietors of the village in suit and had given them a permanent lease of it, and his decision had been affirmed by the Settlement Commissioner, and the Chief Commissioner. Even if the status of their predecessor in title was liable to be altered by inquiry and revision under the rules in Act XXVI of 1866, he would not, merely because he was unable to give the precise proof required by rules 2 and 3 under that Act, necessarily be left in a position which rendered him subject to eviction. On the construction of the decree of 6th January 1869 it was submitted that the expression "for thirty years," did not refer to the duration of the lease, which was meant to be permanent, but referred only to the rent which was intended to remain unaltered for that period. There was nothing in the decree as to ejectment after the expiry of the thirty years. The decree of the Settlement Officers of 15th March 1864 decided that the predecessor in title of the appellants was entitled to a "permanent lease" on the ground that he had been holding for a long term of years in virtue of former proprietary right," which showed what his status was considered to be on the evidence then produced. The decree of the Financial Commissioner did not deprive Bhairon Shukul of any rights he then had. If it only granted him a lease of the land for thirty years, then,

(1) (1895) I. L. R., 23 Calc., 450 ([illegible]): L. R., 23 I. A. 8 ([illegible]).
(2) (1873) L. R. I. A. Sup. Vol. 233.
(3) (1879) I. L. R., 6 Calc., 213 ([illegible]): L. R., 7 I. A. [illegible].
(4) (1871) 14 Moore's I. A. 112 ([illegible]).

to be preferred; and in that view the appeal should be allowed, and the cross appeal dismissed.

1909, *May 11th.*—The judgment of their Lordships was delivered by LORD ATKINSON:—

The matter in controversy in these two consolidated appeals is the right of one Muhammad Ewaz Ali Khan (hereinafter called "the Taluqdar") to recover possession, either in the Civil Courts or in a Revenue Court, of a village situate within the ambit of his taluq, named Gadaria, from the present holders, Maheshar Pershad Shukul and Hargopal Shukul, a minor under the guardianship of Maheshar Parshad, named in the proceedings "the Shukuls." The two main, if not the only, questions for their Lordships' decision are (1) the proper construction of the 13th Rule in the Schedule of Rules attached to the Oudh Sub-Settlement Act, No. XXVI of 1866, and (2) the proper construction of a certain order or decree made on the 6th of January 1869, by L. Barrow, Financial Commissioner, in a suit or proceeding in which one Bhairon Shukul, the predecessor of the present holders, prayed as against Rani Sadha Bibi to be entitled to a pucca lease of the said village with other lands.

The case arises out of the settlement of Oudh. There has been an immense amount of litigation between the parties, and much conflict of opinion on their respective rights. On the 2nd February 1864, the abovementioned Bhairon Shukul instituted a suit in the Court of the Settlement Assistant Commissioner against Rani Sadha Bibi, described as "Taluqdar Mahona," praying for an under-proprietary settlement in the said village of Gadaria and other lands. On the 15th March 1864, judgment was pronounced in this suit by W. E. Forbes, Assistant Settlement Officer, and a "permanent lease of mauza Gadaria Dih with Hasanpur" decreed in favour of the plaintiff, and he was ordered to pay *malikana* to the defendant "at the rate of 25 per cent. on the revised *jama*." This judgment was affirmed by the Settlement Commissioner and the Chief Commissioner. It was admitted in argument that under-proprietary right in any land in this settlement of Oudh meant the right to hold the land in perpetuity for a heritable and alienable estate, at a fixed rent, subject to a revised assessment. And though the words

1909

Maheshar Parshad v. Muhammad Ewaz Ali Khan.

"permanent lease" are used in this decree, it cannot have been meant that the relation of landlord and tenant was to be created between the parties. The rights the plaintiff claimed were "under-proprietary rights." The decree commences thus:—

> "After a careful consideration of all the evidence and the facts brought to light thereby in this case, I have come to the conclusion that the plaintiff's claim to a *permanent lease* is a good and just one,"

so that it is evident that the Assistant Settlement Officer regarded a "permanent lease" and "under-proprietary rights," when applied to the tenure of such lands as these, as convertible terms.

The Oudh Sub-Settlement Act received the assent of the Governor-General on the 12th October 1866. Very soon after Rani Sadha Bibi presented under this Act a petition to L. Barrow, the new Financial Commissioner, for a review of the late Financial Commissioner's judgment.

On the 17th January 1867, judgment was delivered and the case was ordered to be remanded to the Settlement Court for re-investigation under the new rules on the ground that it did not appear from the judgments of the Lower Courts that the respondent's possession was "sufficiently continuous to entitle him to Sub-Settlement," and that it was doubtful whether he even then could get Sub-Settlement, or *sir*, equal to the profits of his lease. Other proceedings were taken and ultimately, on the 6th January 1869, the same Financial Commissioner pronounced a decree in the following terms:—

> "It appears that the *mauza* in suit was included in Taluqa Mahena in 1228 Fasli, having previously been incorporated in Taluqa Dookali in or about 1191 Fasli, but the Upadhias from whom the plaintiff claims were not in proprietary possession on either of these occasions. The Settlement Officer, however, supposes that plaintiff and his forefathers have been in sub-proprietary possession, and that plaintiff is entitled to a decree for Sub-Settlement, and further, appellant's Agent expressed his willingness to come to terms.
>
> "The provisions of the Sub-Settlement Act have not been complied with, but as the special appellant's Agent is willing to compromise the suit, there need be no further difficulty in disposing of the case. I will only add that as the original proprietary title has not been proved, the plaintiffs are in no way entitled to Sub-Settlement, which actually restores them under our rules to proprietary possession, and makes the Talukdar, who has been half a century in possession the mere recipient of *malikana*. I decree a farming lease to plaintiff, he paying the Government demand plus 25 per cent. to the Taluqdar for a period of thirty years."

It is contended that this decree was made without jurisdiction, and is therefore a nullity, with the result that the earlier decree of the 15th March 1861 stands, and the Shukuls are therefore entitled to remain in possession of the village by virtue of the under-proprietary rights which that decree gave them.

The answer to this question depends on the construction of the 13th of the above-mentioned Rules. It runs thus:—

"13.—Cases in which claims to under-proprietary rights have been disposed of otherwise than in accordance with these rules will be open to revision, but this rule will not apply to cases disposed of by arbitration or by agreement of the parties."

Rule 2 prescribes what a claimant must prove in order to obtain a sub settlement (which is nothing more than an authoritative ascertainment and declaration of his under-proprietary rights), and enacts, amongst other things, as follows:—

"He must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation. He must also show that he, either by himself or by some other person or persons from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege granted on account of service, or by favour of the Taluqdar, held such lands under contract (*pucka*) with some degree of continuousness since the village came into the Taluqa."

Rule 3 prescribes how the words "some degree of continuousness" are to be interpreted. Claims which have been therefore disposed of "otherwise than in accordance with these Rules" within the meaning of Rule 13, must, therefore, refer to those claims which have not been supported by the proofs prescribed by Rules 2 and 3, amongst others, for the establishment of future claims. Rule 13 would therefore be meaningless, unless it authorized an inquiry into those matters. The argument, however, is that even if, upon this inquiry, it should be ascertained that the claimant had not proved, and could not prove, any of the matters prescribed by Rules 2 and 3, the Chief or Deputy Commissioner should simply abstain from making an order or decree for sub-settlement, and should leave the claimant in the secure possession under the old decree of the under-proprietary rights to which it had been ascertained he was entitled according to the new standard. In their Lordships' opinion, this contention cannot be sustained. Sub-settlement was not a new thing

1909

MAHESHAR PARSHAD *v.* MUHAMMAD EWAZ ALI KHAN.

giving some extra right or privilege over and above what was secured by a decree finding that a person was possessed of under-proprietary right. And the history of the Act together with its provisions, and the rules attached to it, show that the object and purpose with which it was passed were to revise and correct what had been hastily and imperfectly, or loosely done, and to secure that no person should enjoy under-proprietary rights who could not establish his claim in the manner prescribed by those rules. Revision would be a perfunctory and useless operation on any other terms.

Their Lordships therefore think that the Financial Commissioner had jurisdiction to make the decree of the 6th January 1869, and that it is a valid and binding decree.

The next question is, What is its meaning? It is urged that it, in effect, grants the plaintiff a perpetual lease, that the period of thirty years mentioned in it is the period which is to elapse before revision, and that the Taluqdar is practically left in the same position as he was in under the earlier decree, save only that he has not the right to alienate; though why he should not have that right is not shown. But the whole frame of the decree shows that it never could have been intended to put the plaintiff in such a position. He was not a Taluqudar, nor an occupier, and was found not to be a person possessed of under-proprietary rights. The decree does not put him into possession of the land, but merely entitles him to farm the rents of the occupiers. The whole thing was a compromise, and more or less of an anomaly, and though the Financial Commissioner gave him a valuable right, he could not, in the face of his own declaratoin that the provisions of the Sub-Settlement Act had not been complied with, and that the plaintiff was "in no way entitled to Sub-Settlement" which would restore him, under the Rules, to proprietary possession, and make the Taluqdar "a mere recipient of a *malikana*," have intended to put him into a position almost as beneficial as if he had had all the qualifications he is stated to have lacked. Their Lordships are therefore of opinion that the lease decreed was only a lease for a term of thirty years from the date of the decree. That being so, the Taluqdar would be entitled to recover possession if he took the right steps and proceeded

in the right tribunal. He served a notice of ejectment under the provisions of section 52 (2) of the Oudh Rent Act, 1886. That appears to be the right course, having regard to the provisions of the 54th section. No objection has been taken in the arguments to the form of the notice or to the service of it. Section 108 of the Act prohibits all Courts other than Courts of Revenue from entertaining suits by a landlord for the ejectment of a tenant. According to the construction their Lordships have put on the decree of the 6th January 1869, the Shukuls are now in the position of tenants whose tenancy has expired.

The Taluqdar is, therefore, entitled to a declaration, such as is asked for in the suit instituted by him on the 11th January 1900, in the Court of the Subordinate Judge of Sultanpur, —namely, that the Shukuls are not entitled to the rights of under-proprietors, or to any rights other than those of tenants for a term of thirty years whose term has expired,—but not to any further relief. The decree, dated the 13th December 1904, of the Court of the Judicial Commissioner of Oudh, is in their Lordships' opinion right, and should be affirmed.

The Shukuls, however, instituted a suit in the Court of the Deputy Commissioner of Sultanpur, under section 108 (8) of the Oudh Rent Act, 1886, in which they prayed that the abovementioned notice of ejectment might be cancelled. The Deputy Commissioner, on the 9th May 1906, made a decree cancelling it, and holding that the Shukuls were entitled to a perpetual farming lease. Against this decree the Taluqdar appealed to the Court of the Commissioner of Fyzabad. On the 13th August 1906, that Court made an order dismissing the appeal. Against this order the Taluqdar appealed to the Board of Revenue for the United Provinces of Agra and Oudh; but by an order of that Board, dated the 2nd January, 1907, his appeal was dismissed. Against this order and the decree of the Commissioner of Fyzabad the Taluqdar has, by special leave, appealed to His Majesty in Council, and his appeal has been consolidated with the first-named appeal. Their Lordships are of opinion that the orders appealed against by the Taluqdar were wrong, and should be reversed.

1909

MAHESHAR PARSHAD *v.* MUHAMMAD EWAZ ALI KHAN.

Their Lordships will therefore humbly advise His Majesty that the first-named appeal should be dismissed; that the taluqdars appeal should be allowed; that the orders or decrees of the Board of Revenue for the United Provinces of Agra and Oudh, the Court of the Commissioner of Fyzabad, and the Court of the Deputy Commissioner of Sultanpur, dated respectively the 2nd January 1907, the 13th August 1906, and the 9th May 1906, should be reversed; and that the action instituted in the last-mentioned Court should be dismissed, with costs throughout, but without *prejudice* to the claims made by the Shukuls in paragraph 7 *(f) of their* plaint in the said action under section 57 of the Oudh Rent Act 1886.

The appellants in the first-named appeal must pay the costs of that appeal, and the respondents to the Taluqdar's appeal must pay his costs of that appeal.

Appeal allowed.
Cross appeal dismissed.

Solicitors for the appellants *in the* appeal, and respondents in the cross appeal:—*T. L. Wilson & Co.*

Solicitors for the respondent in the appeal and appellant in the cross appeal:—*Barrow, Rogers & Nevill.*

J. V. W.

P C.
1909
March 23, 24.
May 13.

PARBATI (DEFENDANT) *v.* NAUNIHAL SINGH (PLAINTIFF).
[On appeal from the High Court of Judicature for the North-Western

After the death of one of the members of a joint family in 1861 the other members mutually agreed that the joint property should be thenceforth held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector dated 13th June 1861 to have their names entered to that effect in the official papers of the village. This was done, the petition was filed in the Collectorate, and entries were made in the village papers in accordance with it up to 1899.

Held by the Judicial Committee (reversing the decision of the High Court) that on the evidence in and circumstances of the case, a partition of the property

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Present :—Lord ATKINSON, Lord COLLINS, Lord GORELL, and SIR ARTHUR WILSON.

had been effected in 1861, and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time.

The principles laid down in *Appovier* v. *Rama Subba Aiyan* (1), and *Balkishan Das* v. *Ram Narain Sahu* (2) followed

The High Court had proceeded in an erroneous method in considering whether each document was by itself sufficient to rebut the *prima facie* presumption that as the family was joint before 1861 it continued to be joint, and omitting to take into account the cumulative effect of all the documents, which taken together showed that all the transactions of the 38 years from 1861 to 1899 could only be reconciled and made consistent on one hypothesis, namely, that the petition of 1861 was a genuine document, and the agreement it embodied a real agreement.

APPEAL from a judgment and decree (27th May 1904) of the High Court at Allahabad, which reversed a decree (29th November 1901) of the Court of the Subordinate Judge of Aligarh.

The main question for decision on this appeal was whether the respondent (plaintiff) and his uncle, one Dalip Singh, were, or were not, members of a joint Hindu family at the death of Dalip Singh in February 1899. A pedigree showing how the parties to the litigation were related, is set out in their Lordships' judgment, and showed that Tara Singh died in 1858 leaving him surviving two sons Nirmal Singh and Dalip Singh, and a widow Musammat Phul Kunwar. Nirmal Singh died leaving an infant son, the plaintiff, and a widow Musammat Rani. After the death of Nirmal Singh in 1861 a dispute arose in the family about the estate left by Tara Singh, the settlement of which was recorded to the following effect in an application to the Revenue Court dated 13th June 1861, as to the manner in which the property would be held, the applicants who were described as "petitioners" being (1) Dalip Singh; (2) Musammat Rani, for herself and as guardian of her minor son Naunihal Singh; and (3) Musammat Phul Kunwar.

"After the death of Nirmal Singh, there arose some dispute between us, the applicants, in connection with the estate of Chaudhri Tara Singh, the ancestor of us, the executants, which has with mutual consent been settled in this way:—

"The whole of the ancestral property and property newly purchased with the exception of patti Shadi Ramwala in kasba Shikarpur and the remaining estate—in equal shares (that is) half and half. Dalip Singh to enjoy profits and bear loss to the extent of one-half, and Musammat Rani, widow, and

(1) (1866) 11 Moore's I. A., 75. (2) (1903) I. L. R., 30 Calc., 738; L. R. 30 I. A., 139.

1909

PARBATI
v.
NAUNIHAL
SINGH.

The Subordinate Judge decided that the plaintiff had not been joint with Dalip Singh. He summed up his reasons as follows:—

"The conclusion to which I come is that until Nirmal's death the family had been joint, after his death, the property was divided by an arrangement between Dalip Singh and Rani; the arrangement was accepted by the plaintiff; he has since he attained majority held and possessed the property which by the arrangement had been allotted to him; he applied for partition by the revenue authority, he got his share separated; he has dealt and transacted business on his own account; he did not during Dalip Singh's lifetime ever raise any objection to Dalip Singh having business in his single name; he received profits from him; he managed his own share; he could, have objected to the partition, he could have applied that it should be refused and have insisted that the family was joint, he did not insist on it, he joined himself in the prayer for partition. Dalip Singh's estate is much more valuable than what is owned and possessed by the plaintiff. It should have been, he says, equal had there been a partition. But Dalip Singh increased it after the partition. He traded in corn, he had lending business. The plaintiff who resided at Jehangirabad sold his grain. He had a little lending business.

"I hold on the first issue that plaintiff was not joint with Dalip Singh. He is not therefore entitled to succeed him."

Consequently the Subordinate Judge made a decree dismissing the suit with costs.

An appeal to the High Court was heard by SIR JOHN STANLEY, C.J., and BURKITT, J., who reversed the decision of the Subordinate Judge, and (except in regard to a small portion of the property in suit) they decreed the plaintiff's claim.

The High Court considered that the evidence on which the defendant relied was insufficient to prove the separation contended for between the plaintiff and Dalip Singh. With regard to the receipts which were put in by the defendant, with other documents, to prove that Musammat Rani receives the profits of her divided share from Dalip Singh, they hold that they could not be taken into consideration against the plaintiff on the ground that they were not signed by Musammat Rani herself; and that Shib Charan (her own brother and sarbarahkar) and Dalip Singh who signed the receipts on her behalf had no power to do so under the power of attorney executed by her in their favour. After considering the petition of the 13th June 1861, the High Court said:—

"It is contended that this petition had the effect of working a separation in the family between Dalip Singh and the plaintiff who it is alleged were

henceforth separate owners each of half of the estate. We find ourselves unable to concur with the learned advocate for the defendant who earnestly pressed this contention on us. We notice that no such effect was claimed for this petition in the lower court. It is not even mentioned in her written statement by the defendant. The petition in our opinion amounts to no more than a compromise between the two widows, an arrangement for the management of the estate for the time being and for the purpose of supplying the revenue authorities with the names of persons to be appointed lambardars of the several villages comprised in it, and the nominal apportionment of shares between the plaintiff and Dalip can be considered to be no more than an expression of the ladies' opinion that *that* was the measure of their interest in the family estate . . . . . .

"Before leaving the subject of the petition of June 13th, 1861, we would remark that *it is the only evidence produced by the defendant with the object of showing an intention to separate among the members of the family*. At the most it is but a petition presented to revenue authorities intimating the wishes of the family as to the entry of names consequent on Nirmal's death and as to the appointment of lambardars. It does not profess to be signed by Musammat Rani but was written and filed by her brother Sheo Charan apparently without any authority in writing from his sister. It is from this petition coupled with the subsequent conduct of the parties and other evidence that we are asked to infer separation from 1861. As showing the subsequent conduct of the parties the learned advocate for the defendant laid great stress on certain partition proceedings which took place after 1861."

After discussing in detail the four cases of partition the High Court said:—

"Are we then bound to infer that these four cases are strong evidence of a severance or separation of interests between plaintiff and Dalip from 1861 onwards and indicate an intention on their part that the rest of the family property (the great bulk of it) should between them be the subject of ownership in certain defined shares. We think not. We cannot draw such a far reaching inference from these few and isolated instances. They in our opinion show no more than that in these three cases (in one case from local reasons and in two cases from reasons personal to Dalip) it was thought advisable to separate from the *other* co-sharers, and Dalip may have thought that unless there was a partition between him and his nephew also he could not get a partition as against other co-sharers. It will be noticed that in all these cases there were many co-sharers interested who did not belong to plaintiff's and Dalip's family. Not one instance has been adduced of a partition of a mahal in which plaintiff and Dalip were the sole co-owners. But though some portion of a joint family estate may have been divided or partitioned between the members of the family, it does not follow that thereby a severance of interests is effected in the remainder of the estate. This is laid down by their Lordships of the Privy Council in the case of *Rewun Pershad* v. *Radha Beeby* (1), where *inter alia* their Lordships hold it to be undisputed "that a division may be either total or partial." Also in their judgment in *the Shiva Ganga case* (2) their Lordships in a passage cited from MacNaghten's Hindu

(1) (1846) 4 Moore's I. A., 137 at page 138. (2) (1863) 9 Moore's I. A., 539 at page 610.

1903

PARBATI
v.
NAUNIHAL
SINGH.

Law contemplate the possibility of an estate being partially joint and partially divided, when they say 'that where a *residue is left undivided* upon partition what is divided goes as separate property, what is undivided follows the family property . . . . In other words the law of succession follows 'the nature of the property and of the interest in it.'"

And they concluded their judgment as follows:—

"Finally, for the reasons we have above set forth at length, we are of opinion that there was no separation in this family before the death of Nirmal. We find that the *arrangement* of June 13th, 1861, did not have the effect of working a separation between plaintiff and his uncle, and was merely a compromise between plaintiff's mother and grandmother. We find that the partitions affected only a small portion of the family estate, the great bulk of which remained joint and undivided. The evidence of the witnesses called for the plaintiff is in our opinion truthful, while the past evidence produced for the defendant is we think mostly useless, untrustworthy, and not to be compared with that called for the plaintiff. We are of opinion that the evidence of the plaintiff and of his witnesses coupled with plaintiff's documentary evidence showing that plaintiff and his uncle Dalip jointly instituted and defended suits during a long series of years, overwhelmingly proves that plaintiff and his uncle lived as members of a joint Hindu family which consisted, after the death of Har Narayan, of Dalip and the plaintiff, that no separation of interest or of title as far as the great bulk of the family property is concerned, took place between the uncle and nephew; that they were joint at the death of Dalip in February 1899, and that thereupon the plaintiff succeeded by right of survivorship to possessing his uncle's interest in the joint family property."

The High Court therefore allowed the appeal and made a decree in favour of the plaintiff.

On this appeal, which was heard *ex parte*

DeGruyther, K. C. and *Ross* for the appellant contended that the evidence on the record was sufficient to prove separation between the plaintiff and Dalip Singh in 1861, and that up to the death of the latter they had lived and enjoyed their respective shares of this property in severalty. The High Court in coming to an opposite conclusion had not acted in accordance with the principles laid down in *Appovier* v. *Rama Subba Aiyan* (1), and *Balkishen Das* v. *Ram Narain Sahu* (2). In the present case the members of the family had agreed in 1861, to become separate in title, and had put their intention into the form of the petition of 13th June 1861, stating that from that time they intended that the property (which they specified), should be the subject of ownership in certain defined shares; and thenceforth it

(1) (1866) 11 Moore's I. A., 75.   (2) (1903) I. L. R., 30 Calc., 738; L. R. 30 I. A., 139.

had been so held: this, without any actual physical division was sufficient on the principles abovementioned to effect separation. The High Court had put a wrong construction on that petition and the subsequent proceedings of the parties which confirmed its meaning and intention. That court also erred in rejecting the papers put in by the defendant to prove payments of the plaintiff's divided share of the profits; those payments, it was contended, showed that the profits of the properties divided in accordance with the petition of 13th June 1861, were separately enjoyed by the persons to whom they were allotted; and a separation of interests between Dalip Singh and the plaintiff was also indicated by the proceedings taken by them in the Revenue Courts on four separate occasions for a complete partition of portions of the property which was divided in 1861; in which proceedings the plaintiff concurred; as he had on attaining majority accepted and ratified the partition effected in that year. Reference was made to Mayne's Hindu Law, 7th Ed., pages 665, 667, 669 and 671, paragraphs 492, 493 and 495, *Kandasami* v. *Doraisami Ayyar* (1); *Rewun Pershad* v. *Radha Beeby* (2); and Macnaghten's Principles and Precedents of Hindu Law, Ed. 1829, Volume I, Chapter IV, on "Partition" pages 53 and 54, the two last reference being to passages from which it was contended the High Court had drawn a wrong inference in their judgment under appeal which it was submitted on the above grounds should be set aside.

1909, *May* 13*th*.—The judgment of their Lordships was delivered by LORD ATKINSON:—

In this case the respondent, Chaudhri Naunihal Singh, the only son of Chaudhri Nirmal Singh, deceased, on the 28th September 1900, instituted in the Court of the Subordinate Judge of Aligarh, a suit in the nature of an ejectment against the appellant, Musammat Parbati, widow of his paternal uncle, Chaudhri Dalip Singh, deceased, to recover possession of the lands fully described in the schedule attached to his plaint, and for other relief.

He based his right to the relief he sought on two alleged facts, (1) that his late father and his late uncle, Dalip Singh,

(1) I. L. R., 2 Mad., 317. (2) (1846) 4 Moore's I. A., 137.

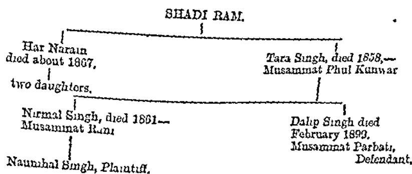
1909

ARBATI
v.
UNIHAL
INGH.

were the two male members of a joint Hindu family of which he (the plaintiff) was the surviving male, and (2) that the property which was sought to be recovered belonged to that family jointly.

The defendant resisted this claim on the ground, among others, that all the joint family property had, by agreement between the then existing members of the family, been partitioned in interest in the year 1861, though not then, and only to a small extent afterwards, partitioned by metes and bounds, and that the land sought to be recovered was the separate property of her husband, Dalip Singh, who died the owner in possession thereof on the 1st February 1899.

The following pedigree shows the relationship of the several parties to the suit:—



The two daughters of Har Narain have not been made parties to the action, and do not apparently claim any interest in this property, and the precise nature of Har Narain's right to or interest in it (if any) does not appear. The Subordinate Judge decided in favour of the defendant and dismissed the action, holding that there had been a partition of the family property in 1861, and that the plaintiff was not joint owner with Dalip Singh at the time of the latter's death, and, consequently, was not entitled to succeed him. The High Court at Allahabad by their decree of the 27th May 1904, set aside this decree "with the exception of Mahal Dalip Nagar partitioned in 1870, and the Mahals partitioned to Dalip in 1890 and 1893 in Shamilat, Shikarpur, and in Khandwaya, to which the defendant is entitled for a widow's estate," and declared that, as to all the rest of the property claimed, ... the family was a joint Hindu family during the lifetime of Dalip Singh, that since his

death the plaintiff has been the owner and in possession of the aforesaid property as survivor, and that the defendant has no right to it." Against this decree the defendant has lodged the present appeal.

The several partitions mentioned in the decree of the High Court were partitions by metes and bounds of the joint property, carried out under orders of competent tribunals.

Though the question for decision by their Lordships is one of fact, its proper determination turns upon the application of certain legal principles to the facts proved, and the true conclusion to be drawn from these facts viewed in the light of these principles.

It is much to be regretted, therefore, that the attention of the High Court was not directed to the two authorities in which those principles have been laid down—in the first by Lord Westbury, and in the second by Lord Davey—namely, the cases of *Appovier* v. *Rama Subba Aiyan* (1) and *Balkishen Das* v. *Ram Narain Sahu* (2). In both these cases the members of a joint Hindu family, some of them being minors, acting by and through their parents, executed instruments in writing providing, in the first case, that part, and, in the second case, that the whole, of the joint family property should belong to and be enjoyed by the different members of the family in specified shares. The effect of this was held to be that, as to the property so dealt with, there was a division of rights; the status of the family was changed; the tenancy of the property severed and converted from something, to use the language of English law, like a joint tenancy into a tenancy-in-common, and the previously undivided family became by operation of law divided.

At p. 89 of the report of the first case, Lord Westbury is reported to have expressed himself thus :—

"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he—that particular member—has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must

(1) (1866) 11. Moore's I. A., 75.

(2) (1903) I. L. R., 30 Calc., 738; L. R. 30 I. A. 139.

1909

PARBATI
v.
NAUNIHAL
SINGH.

be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership certain defined shares then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

At p. 91 he proceeds to say:—

"It is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition."

And again at p. 92 there is the following passage:—

"Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right."

In the last quoted passage Lord Westbury stated he used the terms of English law, "joint tenancy" and "tenancy-in-common," by way of illustration. In the second of the abovenamed cases this decision was approved and followed, and on the question of the binding effect of such a deed, or agreement, as is above mentioned, on the interest of a minor who was by and through his parent a party to it, Lord Davey, at p. 150 of the report, in L. R. 30 I. A. expresses himself thus:—

"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition and (as has been said), if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself."

There is not a suggestion in either of the abovementioned judgments that the agreement to partition the joint family

property in interest and right must be embodied in a deed or instrument in writing. It might be a parol agreement.

The question for decision in this case accordingly resolves itself into this: Did the members of this joint Hindu family—namely, Dalip Singh, Musammat Rani, acting for herself and also on behalf of her infant son, the plaintiff, and Musammat Phul Kunwar, the plaintiff's grandmother—on or before the 13th June 1861, agree amongst themselves that their joint family property should thenceforth be the subject of ownership in the defined shares mentioned in their petition, dated the 13th June, 1861, to the Tahsildar to have their names entered in the village papers: that is, Phul Kunwar to enjoy Patti Shadi Ramwala for life, and, subject thereto, one-half of the entire property, as well ancestral as newly purchased, to be taken as divided into equal shares, half and half, one half or share to be enjoyed by Dalip Singh, and the other by the plaintiff and his mother. It cannot be suggested that these shares were not sufficiently "defined" within the meaning of the above-quoted authorities, or that the agreement which the petition purports to embody is not unambiguous, precise, and clear in its language, nor can it be successfully contended that, having regard to the position of the family and the rights of its respective members, this division of the family property was in itself unnatural or unjust. Dalip Singh must then have been 17 or 18 years old since he describes himself on the 16th June 1867 as 24 years of age. He was, therefore, of age according to Hindu law. The plaintiff was an infant two years old. Had a suit for partition of the joint property been instituted on his behalf by a duly appointed guardian *ad litem* as it might have been, or had it been instituted by Dalip Singh, there would *primâ facie* have been allotted to each widow a portion of the property adequate for her maintenance, and, subject to that the whole property would have been divided between the plaintiff and Dalip in equal shares. Little more than this is done by the agreement, since it is by no means certain that the plaintiff's mother would, under such an agreement as this interpreted by Hindu law, get more than what was sufficient to maintain her out of the half of the property allotted to her and her son. In addition to the provision for the division of the property, the

1909

PARBATI
v.
NAUNIHAL SINGH.

petition contained a provision that Dalip Singh was to be lambardar in certain mauzas therein named, and Musammat Rani, under the sarabarahkarship of Dalip Singh, lambardar in certain other mauzas, and Musammat Phul Kunwar in the Patti, namely Shadi Ramwala in Shikarpur. This petition purports to be presented by Dalip Singh and Musammat Rani, on behalf of herself and "as guardian and patron of her minor son Naunihal Singh," and Musammat Phul Kunwar,—Musammat Rani through her brother, Shib Charan, and Musammat Phul Kunwar through her son Dalip Singh. On the same day, the 13th June 1866, an order was made by the Deputy Collector setting forth that the Tahsildar had been "asked to submit a report relating to the lambardarship and sarbarahkarship of the widow of Nirmal Singh," and directing the application (*i.e.* the petition), to be also sent to the Tahsildar "asking him to give the particulars in detail." On the 1st July 1866, the Tahsildar reports that—

"The Kanungo verified the contents of this application (*i.e.*, the petition) from Musammat Phul Kunwar and Musammat Rani . . . who stated that the dispute between them had been settled, and that the applicants had filed the application after settlement of the matter, and that it should be filed with the record."

Upon this the Deputy Collector, on the 2nd July 1866, ordered the application to be brought forward with the record. The petition was thus treated as a serious business transaction by the officer before whom it came. Entries were made in the village papers in accordance with it, and continued to be so made up to the death of Dalip Singh, in 1899, *i.e.* for a period of 33 years. Yet it is this petition that is now impeached by the plaintiff in paragraph 8 of his plaint as "a mere paper proceeding," and the management by Dalip Singh under it described as in no way affecting "the property and business of the joint Hindu family." The High Court deals with it in the following passages of its judgment:

"The petition, in our opinion amounts to no more than a compromise between the two widows, an arrangement for the management of the estate for the time being, and for the purpose of supplying the revenue authorities with the names of persons to be appointed lambardars of the several villages comprised in it, and the nominal apportionment of shares between the plaintiff and Dalip can be considered to be no more than an expression of the ladies' opinion that that was the measure of their interest in the family estate. Musammat Phul

Kunwar takes care that her interest (though she really had no greater interest than as mentioned above) shall be safeguarded, and in that she is imitated by Musammat Rani . . . We cannot find that it had the effect of working a separation in a family which it is now admitted was joint at the time when this petition was prepared.

In another passage of the judgment of the High Court it is said that the statement with which the petition opens—namely, that after the death of Nirmal Singh disputes arose between the applicants in connection with the estate of Tara Singh, the ancestor of the executants, which has been settled by mutual consent in this way—"Supplies the key to and explains why the petition was presented." The most natural and effectual way, however, of terminating such disputes would have been to divide the property between the different members of the family in definite shares, each member becoming entitled to the profits and bearing the losses of his allotted share, substantially as the law would have done. This is precisely what this settlement purports to effect. The High Court fail altogether to explain how the empty form of getting the applicants' names entered in the village papers as lambardars of distinct mauzahs—the property remaining joint and continuing under the management of Dalip Singh—would have conduced to the settlement of any disputes, or how the desire which they attribute to the two widows to appropriate a large portion of the income of the property could be gratified by such means, unless the partition was a real transaction, intended by the widows and Dalip Singh to be operative from the first. The settlement secured to them no benefit whatever, and therefore, the more rapacious they were, the greater the probability that the partition was a real transaction.

With all respect to the learned Judges of the High Court their Lordships are quite unable to concur in their view. The parol evidence is to a great extent worthless. Many of the witnesses depose to matter of which they obviously can know nothing. In some instances they go the length of stating what was the nature of a certain law suit instituted by the parties to the present appeal, or by Dalip Singh. No attested copies of the proceedings in those suits were produced, nor was any excuse given for their non-production. But of the numerous documents given in evidence many are absolutely inconsistent with the continuance

1909

PARBATI v. NAUNIHAL SINGH.

of the family as a joint Hindu family owning the family property jointly; none are inconsistent with the partition, in interest and right, of that property in the manner indicated in the petition; and some are inexplicable on any other assumption.

If there be one thing more than any other inconsistent with the existence of a joint Hindu family, it is that the eldest male, and manager for the family, should treat one member as the owner of his share of the entire property, and account with that member for the income of the property on that basis. Yet the very first business transaction which takes place between Dalip Singh and Musammat Rani after the presentation of the petition is conducted on these lines. She, who is a parda-nashin lady, had on the 6th June 1866, executed a power-of-attorney appointing her brother Shib Charan and Lalji Mal as her "general attorneys and representatives" "for the management of the property and for looking after the Court business." This document was registered on the 23rd July 1866, her execution of it having been first verified in proper form.

One of the villages, a portion of the joint estate, named Khandwaya, had been mortgaged for a sum of Rs. 2,000. Dalip Singh was anxious to redeem the mortgage. In order to effect this, Musammat Rani and Dalip Singh came apparently to the following arrangement. On the taking of accounts between them in respect of the income of "her share" of the family property, a balance was found in her favour of Rs. 1,000 or Rs. 1,100; the amount is differently stated. She authorized him to apply that balance, with an equal sum of his own, in redemption of the mortgage, and two deeds were executed, each bearing date the 16th June 1867, one by Musammat Rani, "by the pen of Lalji Mal, general attorney," called a "receipt," and the other a complementary deed by Dalip Singh, described as 21 years of age, by which instruments the parties became bound to carry out their respective parts of the arrangement. Both these instruments were duly registered. At the foot of each is given a list of all the villages of the zamindari. In the deed executed by Rani, the sum of Rs. 1,000 is described as her share of these villages, "after deducting the Government revenue, household expenses expenses of the servants, and those incurred on occasions of

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